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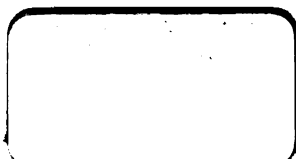


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IRISH COMMON LAW REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS,

EXCHEQUER,

EXCHEQUER CHAMBER, AND COURT OF CRIMINAL APPEAL,

DURING THE YEARS 1859 AND 1860.

Queen's Bench;

By WILLIAM M. JOHNSON, Esq. AND THOS. BRUNKER, Esq.

Common Pleas;

By B. L. FLEMING, Esq. AND SAMUEL V. PEET, Esq.

Exchequer;

By JAMES A. KIFT, Esq. AND SAMUEL WALKER, Esq.

Exchequer Chamber;

By WILLIAM M. JOHNSON, Esq. B. L. FLEMING, Esq.
AND JAMES A. KIFT, Esq.

Court of Criminal Appeal;

By JOHN O'LEARY, Esq.

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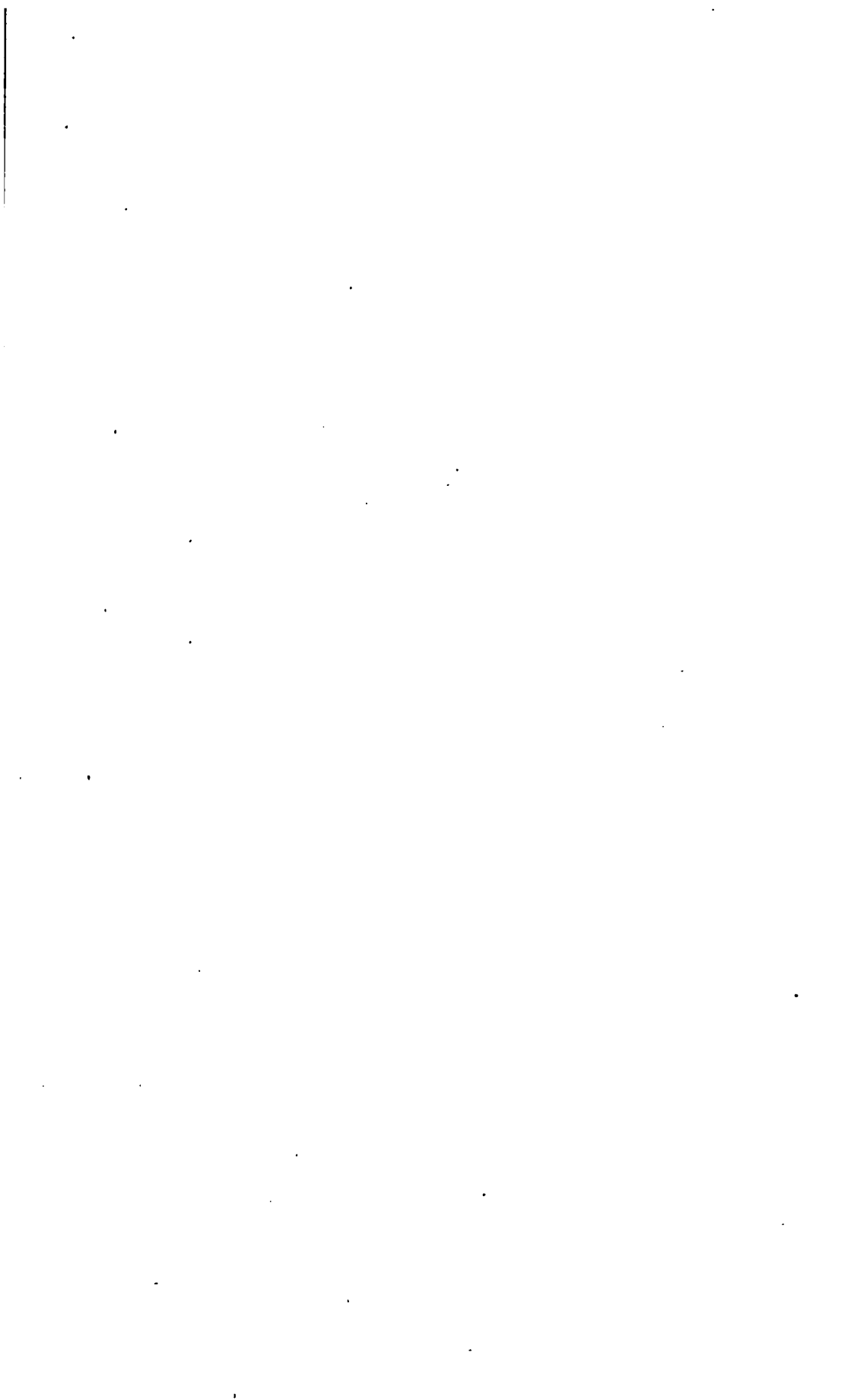
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A T A B L E

OF THE

NAMES OF THE CASES REPORTED.

N. B.—*v* (*versus*) always follows the name of the Plaintiff.

A							
	Aikin, Dobbin <i>v</i>	...	130	Boyle <i>v</i> Mulholland	...	150	
	Anonymous, Rubenstein <i>v</i>	...	386	Branagan <i>v</i> Shaw	...	545	
	Atlantic Royal Mail Steam Navigation Company, Watson <i>v</i>	...	163	Brennan, M'Caffrey <i>v</i>	...	159	
	Atlantic Steam Navigation Company, Powell <i>v</i>	...	App. 47	Brien, Gildea <i>v</i>	...	230	
	Attorney-General <i>v</i> Maxwell	...	262	Burke <i>v</i> Eyre	...	104	
B				C			
	Balfour, Peterson <i>v</i>	...	553	Cahill <i>v</i> Hartnett	...	439	
	Ballance, Stewart <i>v</i>	...	App. 1	Carlisle, O'Rorke <i>v</i>	...	535	
	Ballantine, M'Cormick <i>v</i>	...	305	Carry, Harding <i>v</i>	...	140	
	Barry <i>v</i> Glover	...	113	Clarke <i>v</i> Scully	...	App. 4	
	Bell <i>v</i> Parke	...	279	Cleary <i>v</i> Cleary	...	329	
	Bernard and another, Corcoran <i>v</i>	...	547	Colgan, Crofton <i>v</i>	...	133	
	Blackwell, Hall <i>v</i>	...	App. 38	Colles <i>v</i> Prendergast	...	336	
	Bourke <i>v</i> Murray	...	App. 11	Corcoran <i>v</i> Bernard and another	...	547	
	Boyd <i>v</i> M'Cleans	...	App. 37	Corcoran, Ford <i>v</i>	...	539	
	Boyd <i>v</i> Nethery	...	369	Crean <i>v</i> Metcalf	...	554	
				Creedan, Herlihy <i>v</i>	...	App. 29	
				Creedan, Murphy <i>v</i>	...	App. 29	
				Creedan, Shea <i>v</i>	...	App. 29	

TABLE OF CASES REPORTED.

Cridland, Jackson v ...	... 376	Goggins v Trench ...	... 472
Crofton v Colgan ...	... 133	Gowing v Walsh ...	... 431
Cuffe v Lawson ...	<i>App.</i> 42	Great Southern and Western Rail- way Co., Moore v 46, <i>App.</i> 31	
D			
D'Arcy v Hastings ...	<i>App.</i> 24	Great Southern and Western Rail- way Company, Tuohey v ...	98
Denniston v Digan ...	<i>App.</i> 7	H	
Digan, Denniston v ...	<i>App.</i> 7	Haffield v Mackenzie...	... 289
Dobbin v Aikin ...	... 130	Hall v Blackwell ...	<i>App.</i> 38
Donovan, Salaman v...	<i>App.</i> 13	Harding v Carry ...	... 140
Dowling v Dowling ...	... 236	Hargreave v Meade ...	... 117
Dublin, Justices of, The Queen v	80	Hartnett, Cahill v ...	... 439
Duffy, Segrave v ...	<i>App.</i> 27	Hartnett, Stokes v ...	<i>App.</i> 20
Dunsandle, Lord, v Finney	... 171	Hastings, D'Arcy v ...	<i>App.</i> 24
Dwyer, O'Grady v ...	... 440	Herlihy v Creedan ...	<i>App.</i> 29
E			
Ellis, M'Mahon v ...	... 120	Hill, Lawrenson v ...	177, 498
Eyre, Burke v ...	... 104	Hilliard, Kennedy v ...	... 195
Eyre v Walsh ...	... 346	Howth, Earl of, and another, Smith v ...	... 125
F			
Fahy, O'Hare v ...	... 318	Hudson, Foott v ...	... 509
Finnegan, The Queen v	... 299	I	
Finney, Lord Dunsandle v	... 171	In re Franks ...	... 93
Fitzgibbon v Nagle ...	<i>App.</i> 35	In re O'Brien ...	<i>App.</i> 33
Foot v Warren ...	... 1	J	
Foott v Hudson ...	... 509	Jackson v Cridland ...	... 376
Ford v Corcoran ...	... 539	Johnstone, Leslie v ...	... 83
Foster v Mulhall ...	... 532	K	
Franks, In re ...	... 93	Kearns, Phibbs v ...	<i>App.</i> 19
G			
Gildea v Brien ...	... 230	Kennedy v Hilliard ...	... 195
Glover, Barry v ...	... 113	Kennedy v Lynch ...	<i>App.</i> 44
		Kennedy v Verdon ...	<i>App.</i> 10

TABLE OF CASES REPORTED.

iii

Kerr v Midland Great Western Railway Company	<i>App.</i> 45	Metcalf, Scott and others v ...	557
L		Midland Great Western Railway Company, Kerr v	<i>App.</i> 45
Lane, Martin v ...	<i>App.</i> 3	Moore v Great Southern and West- ern Railway Co.	46, <i>App.</i> 31
Lawrenson v Hill ...	177, 498	Mulhall, Foster v ...	... 532
Lawson, Cuffe v ...	<i>App.</i> 42	Mulholland, Boyle v ...	... 150
Leonard, M'Mahon v ...	... 444	Murphy v Creedan ...	<i>App.</i> 29
Leslie v Johnstone ...	... 83	Murphy v Logan ...	... 87
Logan, Murphy v ...	... 87	Murray, Bourke v ...	<i>App.</i> 11
Lynch, Kennedy v ...	<i>App.</i> 44	N	
M		Nagle, Fitzgibbon v ...	<i>App.</i> 35
M'Caffrey v Brennan ...	... 159	Nethery, Boyd v ...	... 369
M'Carthy, The Queen v ...	... 312	Newenham v Smith ...	... 245
M'Cleane, Boyd v ...	<i>App.</i> 37	Norria, Sawyer v ...	... 168
M'Clory v Wright ...	... 514	O	
M'Connell v M'Kenna ...	... 511	O'Brien, In re ...	<i>App.</i> 33
M'Cormick v Ballantine ...	... 305	O'Grady v Dwyer ...	... 440
M'Kenna, M'Connell v ...	... 511	O'Hare v Fahy ...	... 318
M'Lester v Quinn ...	... 358	O'Keeffe, Quin v ...	... 393
M'Mahon v Ellis ...	... 120	O'Rorke v Carlisle ...	... 535
M'Mahon v Leonard ...	... 444	P	
M'Naghten, Scullin v ...	... 526	Parke, Bell v ...	... 279
Mackenzie, Haffield v ...	... 289	Perrin, Ronayne v ...	<i>App.</i> 36
Magee v Mark ...	... 275	Peterson v Balfour ...	... 553
Mahony v Wright and others ...	... 420	Phibbs v Kearns ...	<i>App.</i> 19
Mark, Magee v ...	... 275	Powell v Atlantic Steam Naviga- tion Company ...	<i>App.</i> 47
Martin v Lane ...	<i>App.</i> 3	Prendergast, Colles v ...	... 336
Massy v Travers and others ...	... 459	Q	
Maxwell, Attorney-General v ...	... 262	Queen, The, v Justices of County Dublin ...	... 80
Meade, Hargreave v ...	... 117		
Metcalf, Crean v ...	... 554		

TABLE OF CASES REPORTED.

Queen, The, v Finnegan	... 299	Stewart v Ballance	... <i>App.</i> 1
Queen, The, v M'Carthy	... 312	Stokes v Hartnett	... <i>App.</i> 20
Quinn, M'Lester v	... 358	T	
Quin v O'Keeffe	... 393	Travers and others, Massy v	... 459
R		Trench, Goggins v	... 472
Roach, Tully v	... <i>App.</i> 21	Tully v Roach	... <i>App.</i> 21
Ronayne v Perrin	... <i>App.</i> 36	Tuohey v Great Southern & West-	
Rubenstein v —	... 386	ern Railway Company	... 98
S		V	
Salaman v Donovan	... <i>App.</i> 13	Verdon, Kennedy v	... <i>App.</i> 10
Sawyer v Norris	... 168	W	
Scott and others v Metcalf	... 557	Walsh, Eyre v	... 346
Scullin v M'Naghten...	... 526	Walsh, Gowing v	... 431
Scully, Clarke v	... <i>App.</i> 4	Warren, Foot v	... 1
Segrave v Duffy	... <i>App.</i> 27	Watson v The Atlantic Royal Mail	
Shaw, Branagan v	... 545	Steam Navigation Company	168
Shea v Creedan	... <i>App.</i> 29	Whelan, Smith v	... <i>App.</i> 17
Smith v Earl of Howth & another	125	Williams v Williams...	... <i>App.</i> 36
Smith, Newenham v	... 245	Wright and others, Mahony v	... 420
Smith v Whelan	... <i>App.</i> 17	Wright, M'Clory v	... 514

A T A B L E

OF

THE NAMES OF THE CASES CITED.

N.B.—*v* (*versus*) always follows the name of the Plaintiff.

Aberdare Canal Co., Regina <i>v</i> ...	371	Armitage <i>v</i> Grafton ...	360
Acheson <i>v</i> Acheson ...	339	Armstrong, Rennick <i>v</i> ...	142
Adams (in error) <i>v</i> Reade ...	380	Armstrong <i>v</i> Turquand ...	339, 343
Aier <i>v</i> Redgwick ...	209	Arundell <i>v</i> Tregono ...	223
Aire <i>v</i> Sedgwick ...	209, 213	Ashby, Tomkins <i>v</i> ...	268
Alcock, Mackey <i>v</i> ...	397	Ashforth <i>v</i> Bower ...	153
Alcock <i>v</i> Royal Exchange Insur- ance Company ...	237	Ashley, Rev. William, case of ...	533
Alcock <i>v</i> Taylor ...	501	Astley <i>v</i> Young ...	205, 214, 222
Alexander, Parsons <i>v</i> ...	136	Atkinson <i>v</i> Carty ...	435
Allen, Hunter <i>v</i> ...	204, 209	Atkinson, Digby <i>v</i> ...	12
Allen <i>v</i> Thorp ...	266	Atkinson <i>v</i> Smith ...	463
Ambrose, Ewer <i>v</i> ...	513	Atkinson, Guardians of Youghal Union <i>v</i> ...	<i>App.</i> 44
Amey, Doe <i>v</i> ...	447	Allantic Steam Navigation Com- pany, Watson <i>v</i> ...	<i>App.</i> 49
Amey, Doe d. Thomas <i>v</i> ...	115	Attenborough <i>v</i> Thompson ...	<i>App.</i> 25
Amey, Doe d. Thompson <i>v</i> ...	9, 41	Attorney-General <i>v</i> Brunning ...	268
Anderson <i>v</i> Fitzgerald ...	447	Attorney-General <i>v</i> Chambers ...	154
Anderson, Regina <i>v</i> ...	303	Attorney-General, Drake <i>v</i> ...	268
Anderson, Scott <i>v</i> ...	<i>App.</i> 43	Attorney-General <i>v</i> Hitchcock ...	238, 512
Andrews, Harrison <i>v</i> ...	339	Attorney-General <i>v</i> Malkin ...	266, 268, 272, 273
Anfield <i>v</i> Feverhill ...	204, 223	Attorney-General <i>v</i> Manners ...	268
Angell, Evans <i>v</i> ...	155	Attorney-General <i>v</i> The Corpora- tion of London ...	170
Angell, Pellecatt <i>v</i> ...	136	Attorney-General <i>v</i> The Great Northern Railway Company...	72
Anonymous case ...	227	Attorney-General <i>v</i> The London South Western Railway Co. ...	54, 72
Anonymous, Von Sandau <i>v</i> ...	399	Attwood's case ...	516
Anonymous <i>v</i> Young... ..	11		
Ansell, Meres <i>v</i> ...	258		
Anster <i>v</i> Holland ...	<i>App.</i> 13		
Applegarth <i>v</i> Colley ...	136		
Archer <i>v</i> Bamford ...	106		

TABLE OF CASES CITED.

Austin v Tuite	...	502	Becke v Smith	...	297
Ayling, Goodman v	...	489	Beckett, Wright v	...	513
Ayres v Sedgwick	211, 212, 223, 224		Beecham, Chapman v	...	480
Bainbridge v Wade	...	257	Belfast and Ballymena Railway		
Baker, Davy v	...	516	Company, Keys v	<i>App.</i>	46
Baker v Rusk	...	516	Bell, Scott v	...	463
Baker, Tenant v	...	278	Bell d. Smyth v Nangle	...	8
Baldwin's case	...	494, 495	Bellamy, Birch v	...	488
Balfe, French v	...	<i>App.</i> 15, 16	Benfield v Petrie	...	516
Ball v Ross	...	162	Benson v Chester	...	321
Ballinger v Ferris	...	181	Bentley v Smith	...	509
Bamford, Archer v	...	106	Berkeley, Wedge v	...	181
Bank of Ireland v The Trustees of			Berry, Cooke v	...	439
Evans' Charities...	...	447	Betham v Fernie	...	164, <i>App.</i> 49
Banks v Holmes	...	330	Bevington, Harrison v	...	513
Barham v The Earl of Clarendon	463,		Beviss, Doe d. Kingslake v	...	439
	469		Bewley v Haughton	...	484, 490
Baring v Christie	...	447	Bigg v Roberts	...	242
Barker v Barker	...	380	Bilson, Crosse v	...	489, 490
Barker v Hargreaves...	...	278	Bingham, Doe v	...	481
Barker's, Sir Anthony, case	...	222	Birch v Bellamy	...	488
Barnard, Lyde v	...	406	Birch v Raleigh	...	516
Barnard, Rex v	...	516	Bird, Fayle v	...	485
Barnett's case	...	541	Bird, Kent v	...	136
Barrett, Long v	...	447	Birmingham, The Inhabitants of,		
Barrett v Midland Railway Co.	...	309	The King v	...	90
Barrett v The Stockton and Dar-			Birnie, Rex v	...	434
lington Railway Company	...	268	Blacket v Wall	...	240
Barry, Hall v	...	321	Blackmore, Dobson v...	...	51
Bartlett v Gibbs	...	540, 541, 543	Blackwell v England...	<i>App.</i>	25
Bartley, Maloney v	...	213, 224	Blake v French	...	463
Barton v Bricknell	...	181, 187, 189	Blake, French v	...	463
Barton v Dawes	...	152	Bland, Lalor v	...	182
Barton, Regina v	...	187	Blay, Strut v	...	107
Batty v Marriott	...	136	Blessington, Gardiner v	...	143
Bead v M'Carthy	...	<i>App.</i> 32	Blunt v Heslop	...	371
Beasley v Darcy	...	<i>App.</i> 22	Boddington, Castelli v	<i>App.</i>	43
Beauchamp, Lord, v Croft	205, 209,		Bodman, Harding v	...	223
	223		Bollard, Hull v	...	91
Beaumont, Thurtell v	...	516	Bolton, Inhabitants of, Regina v	...	559
Beavan, Harris v	...	482	Bolton, Regina v	...	182
Beavan v The Mayor of Manches-			Bolton's case	...	559
ter	...	119	Bond, Smith v	...	399

TABLE OF CASES CITED.

iii

Bonsfield, Doe d. Robinson v ...	36	Brownrigg v Colclough ...	402
Borrough v Taylor ...	115	Brunning, The Attorney-General v ...	268
Boulton v Clapham ...	204	Bryan, Madden v ...	483, 488, 489, 490
Bourke, Lessee Clanmorris v ...	11	Brydges, Harvey v ...	309
Bowdler, Onions v ...	541, 542	Buck, Goldson v ...	423
Bower, Ashforth v ...	153	Buckley v Wood ...	212, 215, 216, 229
Bower, Regina v ...	302	Buckridge v Flight ...	142
Bowker v Burdekin ...	247	Bull v Chapman ...	501
Boydell v Harkness ...	482	Bulpit v Clarke ...	477
Boyle v Lysaght ...	38	Burchell, M'Mahon v ...	340
Braddick, Topham v ...	<i>App.</i> 35	Burdekin, Bowker v ...	247
Bradford, Dublin and Kingstown Railway v ...	152, 153, 158	Burdon, In re ...	90
Bradley, The London and North Western Railway Company v ...	52	Burgess, Hall v ...	84
Bramston v The Mayor of Colches- ter ...	424	Burling v Read ...	<i>App.</i> 37
Branley v Plummer ...	143	Burn v Carvalho ...	340
Breach, Doe d. Oldershaw v ...	41	Burnett v Lynch ...	<i>App.</i> 46
Brennan v Flood ...	483, 484, 490	Bush, Harrison v ...	201, 283
Brennan v Williams ...	<i>App.</i> 17, 18	Butcher, Downing v ...	238
Brett v Rigden ...	492	Butler v Corcoran ...	<i>App.</i> 26
Brice v Wilson ...	272	Butler, Pretty v ...	321
Bricknell, Barton v ...	181, 187, 189	Butler, Stukeley v ...	153
Bridge v Cage ...	380	Butt's case ...	478, 479, 490
Brien, Gildea v ...	196, 217, 218, 220, 229	Byrne v Lord Carew... ..	379
Brigham, Payne v ...	482	Byrne, Montgomery v ...	<i>App.</i> 40
Bright v Hutton ...	446	Byrne's case ...	553
Bright, Luckett v ...	550, 551, 556	Cage, Bridge v ...	380
Broad's case ...	212	Cahill, Darcy v ...	<i>App.</i> 18
Brydges, Fordyce v ...	298	Cahill v Hartnett ...	442
Brook v Montague ...	225, 225	Caledonian Railway Co. v Ogilvy ...	53
Brooks v Haigh v ...	248	Campbell v Fleming ...	106
Brooks v Haigh ...	258	Campbell, Pym v ...	255
Brookwell, Winter v ...	128	Cannock, Cantwell v... ..	<i>App.</i> 18
Rroomhead, Henderson v ...	219	Cantwell v Cannock ...	<i>App.</i> 18
Brown, Hutchins v ...	540	Carew, Lord, Byrne v ...	379
Brown v Mallett ...	118, 282	Carey, Leathley v ...	<i>App.</i> 20
Brown v Peck ...	379	Carey, Mathews v ...	489
Brown, Tenant v ...	360, 364	Carnegie, Collins v ...	296
Browne, Cotton v ...	<i>App.</i> 18	Carney, Coghlan v ...	<i>App.</i> 46
Browne v Ellis ...	401, 405	Carpenter, Doidge v ...	321
		Carr v Taylor ...	340
		Carter, White v ...	183
		Cartwright v Cartwright ...	379
		Carty, Atkinson v ...	435

TABLE OF CASES CITED.

Carvalho, Burn v ...	340	Colclough, Brownrigg v ...	402
Cassidy v Steward ...	447	Cole v Green ...	90
Castelli v Boddington <i>App.</i>	48	Coles v Emerson ...	245
Cator, Rex v ...	421	Coles v Platt ...	321, 328
Caudle v Seymour 182, 185, 188, 434		Colley, Applegarth v... ..	136
Cave v Mountain 181, 182, 194, 195		Collier, Melliush v ...	238, 513
Cavendish v Graves ...	340	Collins v Carnegie ..	296
Cawdor, Earl, v Lewis <i>App.</i>	23	Collins v De Montmorency ...	165
Chamberlaine's case ...	211, 212	Collins v Hungerford... ..	502
Chambers, Attorney-General v ...	154	Collis v Prendergast ...	<i>App.</i> 22
Chapman v Beecham... ..	480	Considine v Tubbledy ...	340
Chapman, Bull v ...	501	Constable, Newton v 387, 389, 391	
Chapman, Jones v ...	<i>App.</i> 37	Cooke v Berry ...	439
Charters v Gilroy ...	11	Cooke, West v ...	<i>App.</i> 1
Cheek v Jefferies ...	142	Cooke v Wildes ...	284
Cheek, Shortrede v ...	258	Cooper, Eaden v ...	540
Cheesman v Hardham ...	321	Cooper v Le Blanc ...	<i>App.</i> 10
Chester, Benson v ...	321	Cope v Rowlands ...	132
Chester & Holyhead Railway Co., Kisbey v ...	165, <i>App.</i> 49	Corbally, Shenton v 6, 12, 13, 40, 45	
Chichester v Lethbridge ...	51	Corbishley, Derecourt v 435, 438	
Christie, Baring v ...	447	Corcoran, Butler v ...	<i>App.</i> 26
Christie, Watts v ...	339	Corcoran v M'Cabe ...	561
Christopher, Regina v ...	181	Corner v Shaw ...	272
Christy, Tancred v ...	510	Cort, Clark v ...	339, 343
Church v Imperial Gas-light Co. ...	84	Cotton v Browne ...	<i>App.</i> 18
Churchward v Graham 370, 372, 374, 375		Coulsting, Orchard v... ..	<i>App.</i> 12
Clanmorris, Lessee, v Bourke ...	11	Coursep, Stanley v ...	212
Clapham, Boulton v ...	204	Courtown, Lord, Logan v ...	298
Clapham, Moulton v ...	204	Courtown, Underwood v ...	143
Clarendon, The Earl of, Barham v 463, 469		Coust v Phillips ...	142, 143
Clark v Cort ...	339, 343	Cowlam v Slack ...	321
Clarke, Bulpit v ...	477	Coxe, Harrington v 396, 398, <i>App.</i> 40	
Clarke v Riordan ..	<i>App.</i> 2	Coxhead v Richards ...	284
Clarke v Webb ...	84	Crawford v Stirling ...	<i>App.</i> 43
Clarkson, Holloway v ...	266	Crewe v Crewe ...	380
Clements, Little v ...	181	Cristall, Ferguson v ...	132
Cobbett, Ex parte ...	387	Croft, Lord Beauchamp v 205, 209, 228	
Codd, Stratton v ...	<i>App.</i> 40	Crosse v Bilson ...	489, 490
Coghlan v Carney ...	<i>App.</i> 46	Crowley v Page ...	513
Colchester, Mayor of, Bramston v 424		Crowly, Gilman v ...	406
		Crowter, Whately v ...	122
		Cundell v Dawson ...	132
		Curson, Stanley v ...	212, 223

TABLE OF CASES CITED.

Curtis v Spitty ...	84, 85	Dobson v Blackmore ...	51
Custis v Sandford ...	<i>App.</i> 23	Dodd v Holme ...	118
Cutler v Dixon ...	204, 209, 223	Dodd, Law v ...	508
Cutler v Powell ...	107	Doddington's case ...	153
Daking v Whimper ...	463	Doe v Amey ...	447
Dale, North Staffordshire Railway Company v ...	77	Doe v Bingham ...	481
Dally, Silly v ...	482	Doe v Gregory ...	349, 354
Damport v Sympson ...	200	Doe v Halloway ...	142
Daniel v Dudley ...	266	Doe v Lock ...	481
Daniel v Grace ...	128	Doe, Nepean v ...	850
Daniels v Davison ...	<i>App.</i> 8	Doe v Perkins ...	350
Danner, Flounders v ...	542	Doe v Ramsbottom ...	33
Darcy, Beasley v ...	<i>App.</i> 22	Doe v Scott ...	349
Darcy v Cahill ...	<i>App.</i> 18	Doe v Williams ..	349
Darnley v Lipacombe ...	<i>App.</i> 17	Doe d. Beadon v Pike ...	8
Daubinet, Westover v ...	203	Doe d. Biass v Horsley ...	116
Davey v Warren ...	501	Doe d. Bromfield v Smith ...	41
Davies v Hopkins ...	542	Doe d. Chandless v Robson ...	115
Davis v Donovan ...	<i>App.</i> 13, 14	Doe d. Daniell v Woodrooffe ...	7
Davis, Lessee of Black v ...	14	Doe d. Davis v. Elsam ...	115
Davis v O'Hara ...	486	Doe d. Eyre v Palmer ...	350
Davis, Rex v ...	421	Doe d. Gray v Stanion ...	<i>App.</i> 8, 9
Davison, Daniels v ...	<i>App.</i> 8	Doe d. Hammek v Fillis ...	<i>App.</i> 13
Davy v Baker ...	516	Doe d. Harris v Masters ...	115
Dawes, Barton v ...	152	Doe d. James v Price ...	439
Dawson, Cundell v ...	182	Doe d. Kingslake v Beviss ...	439
Dawson, Edinburgh and Leith Railway Company v ...	<i>App.</i> 2	Doe d. Laurence v Shawcross ...	115
Delacour v Murphy ...	396, <i>App.</i> 40	Doe d. Naylor v Stephens ...	142
Delany v Jones ...	284	Doe d. Oldershaw v Breach ...	41
De Montmorency, Collins v ...	165	Doe d. Prosser v King ...	<i>App.</i> 13
Denn, Ward v ...	330	Doe d. Robinson v Bousfield ...	36
Derby, Earl of, Witham v ...	509	Doe d. Shepherd v Roe ...	<i>App.</i> 13
Derecourt v Corbishley ...	435, 438	Doe d. Souther v Hall ...	350, 354
De Saily v Morgan ...	513	Doe d. Strickland v Strickland ...	8
Dickenson v Watson ...	307	Doe d. Thomas v Amey ...	115
Dickson v Pape ...	268	Doe d. Thomas v Field ...	12
Digby v Atkinson ...	12	Doe d. Thompson v Amey ...	9, 41
Dingle v Hare ...	513	Doe d. Tilt v Stratton ...	41
Dixon, Cutler v ...	204, 209, 223	Doe d. Wilson v Philips ...	115
Dixon v Franks ...	282	Doidge v Carpenter ...	321
Dobinet, Weston v ...	203, 209, 223	Donovan, Davis v ...	<i>App.</i> 13, 14
		Donovan, Salaman v ...	<i>App.</i> 14
		Dore v Gray ...	423

TABLE OF CASES CITED.

Dorman, Sheehan v ...	... 359	Eckles, Hawkins v ...	... 489
Dorman, Sheehy v ...	... 161	Ede v Scott ...	... 282
Dormer v Packhurst	405, 481	Eden, Selby v ...	485, 486
Dormer, Sheehy v ...	363, 364	Edinburgh and Leith Railway Co.	
Dormer's case ...	... 115	v Dawson ...	<i>App.</i> 2
Dorrell, Lamine v ...	<i>App.</i> 43	Edwards v Jevons ...	... 258
Douglas, Williams v ...	... 227	Edwards, Sim v ...	... 339
Dowell v The General Steam Navigation Company	307, 309	Edwards, Standen v ...	... 516
Dower v Dunphy ...	<i>App.</i> 38	Edwards v Wakefield ...	... 122
Dowling v Harman ...	<i>App.</i> 1, 2	Egan v Kirkaldy	162, 359, 363
Dowling v Wallace ...	<i>App.</i> 35	Elliott v Fiely ...	... 486
Downing v Butcher ...	... 238	Ellis, Browne v ...	401, 405
Downing v Luckett ...	559, 561	Ellis, Pierce v ...	... 282
Dowtie's case ...	... 153	Ellis v The London and South Western Railway Co.	... 309
Doyle v The Dublin and Drogheda Railway Company	... 309	Elsam, Doe d. Davis v ...	... 115
Drake v The Attorney-General	... 268	Elvidge, Gregory v ...	... 360
Drury v Kent ...	... 321	Emerson, Coles v ...	... 245
Dublin and Drogheda Railway Co., Doyle v ...	... 309	Emery v Mucklow ...	<i>App.</i> 13
Dublin and Drogheda Railway Co., Little v ...	... 53	Empsey, Zouch v ...	... 371
Dublin and Kingstown Railway Co. v Bradford	152, 153, 158	England, Blackwell v ...	<i>App.</i> 25
Dublin and Wicklow Railway Co., Rice v ...	359, 364	England v Slade ...	... 33
Dubois v Wise ...	386, 391	English, Hutton v ...	<i>App.</i> 33
Dudley, Daniel v ...	... 266	Erdy v Martin ...	... 447
Dunn, Trotman v ...	213, 224	Essex, Tisdale v ...	... 479
Dunphy, Dower v ...	<i>App.</i> 38	Evans v Angell ...	... 155
Dunscombe, In re ...	<i>App.</i> 15	Evans' Charities, Trustees of, The Bank of Ireland v ...	... 447
Dunston v Patterson	<i>App.</i> 26	Evans, Philips v ...	... 331
Durden, Moon v ...	... 447	Evans v Pratt ...	... 136
Durham, Rex v ...	... 516	Evans, Tuson v ...	... 284
Eaden v Cooper ...	... 540	Everdon, King v ...	... 407
East and West India Docks and Birmingham Junction Railway Co. v Gattke	52	Ewer v Ambrose ...	... 513
Eastern Counties Railway Co., Regina v ...	52, 53	Ex parte Cobbett ...	... 387
Easto, Richards v ...	... 507	Ex parte Henn ...	96, 97
Eaton, Robson v ...	<i>App.</i> 13	Ex parte Smith ...	... 340
		Ex parte Stephens ...	... 340
		Ex parte Warrington ...	... 421
		Eyre, Pike v ...	9, 143
		Eyres v Sedgewicke ...	... 203
		Fairbrother, Wodehouse v	339, 341, 344
		Fairman v Ives ...	... 207

TABLE OF CASES CITED.

vii

Farler, Rex v	...	516	Francis, Harvey v	...	447
Farr, Rede v	...	7	Frank, Tripp v	...	96
Farran v Fleo	...	284	Franks, Dixon v	...	282
Fawcett, Lessee of, v Hall	...	486	Freeman v Lomas	...	340, 342
Fayle v Bird	...	485	French v Balfe	...	<i>App.</i> 15, 16
Featherston v Hutchinson	...	380	French, Blake v	...	463
Feely, Walsh v	...	486	French v Blake	...	463
Fennell, Lord Waterpark v	...	154	French, Lessee Porter v	...	6, 486
Ferguson v Cristall	...	182	French v Styling	...	136
Fernie, Betham v	...	164, <i>App.</i> 49	Frew v Stone	...	164, <i>App.</i> 49
Fernie, Hodgkinson v	...	330, 334	Friend, Watts v	...	132
Ferrar, Roé v	...	350	Galgay v The Great Southern and Western Railway Company	...	53
Ferris, Ballinger v	...	181	Gardiner v Blessington	...	143
Feverhill, Anfield v	...	204, 223	Garland, Lester v	...	370
Field, Doe d. Thomas v	...	12	Garrett v Waldron	...	173, 174
Field, Huzzey v	...	96	Gaskell v King	...	379
Fiely, Elliott v	...	486	Gason v O'Ryan	...	86
Fillis, Doe d. Hammek v	...	13	Gason v Ryan	...	85
Finch v Miller	...	12	Gattke, The East and West India Docks and Birmingham Junc- tion Railway Company v	...	52
Finlay, Granger v	...	118	Gelan v Hall	...	181
Finnegan, Regina v	...	314	General Steam Navigation Com- pany, Dowell v	...	307, 309
Fisher, Morell v	...	154	Gibbs, Bartlett v	...	540, 541, 543
Fisher v Ronalds	...	122	Gibbs v Pike	...	207
Fitzgerald, Anderson v	...	447	Gibson, Nowlan v	...	<i>App.</i> 10
Fladong v Winter	...	240, 241	Gildea v Brien	...	195, 217, 218, 220, 229
Fleming, Campbell v	...	106	Gilman v Crowley	...	406
Fleming v Simpson	...	107	Gilmore, Scott v	...	380
Fleo, Farran v	...	284	Gilpin v Gilpin	...	380
Fletcher, Flitcroft v	...	122	Gilroy, Charters v	...	11
Flight, Buckridge v	...	142	Girdlestone, Grenfell v	...	241
Flint v Pike	...	228	Goldshede v Swan	...	248, 257, 258
Flitcroft v Fletcher	...	122	Goldson v Buck	...	423
Flood, Brennan v	...	483, 484, 490	Goodman v Ayling	...	489
Flounders v Donner	...	542	Goodtitle v Jones	...	509
Fogg, Selway v	...	106	Goodtitle d. Luxmore v Saville	...	115
Fonblanque v Lee	...	142, <i>App.</i> 33	Goodtitle v Southern...	...	154
Fordyce v Bridges	...	298	Gorges, Willaume v	...	241
Forrest, Pollitt v	...	480	Gorman v Hinks	...	<i>App.</i> 40
Forster, Mitchell v	...	371			
Forward v Pittard	...	<i>App.</i> 46			
Foster v Roundel	...	360			
Foster's case	...	423			
Fowler, Priestly v	...	118			

Gossett, Howard v ...	... 182	Hall, The South Staffordshire Rail- way Company v ...	... 52
Grace, Daniel v ...	... 128	Halloway, Doe v ...	... 142
Grady v Hunt ...	... 182	Hammond v Messenger	340, 342
Grafton, Armitage v ...	... 360	Hardham, Cheesman v ...	... 321
Graham, Churchward v 370, 372, 374, 375		Harding v Bodman ...	... 223
Granger v Finlay ...	... 118	Hardwicke, Newman v ...	... 371
Grattan v Lendrick ...	... 314	Hare, Dingle v ...	... 513
Graves, Cavendish v ...	... 340	Hargreaves, Barker v ...	... 278
Gray, Dore v ...	... 423	Harkness, Boydell v ...	... 482
Gray, Hill v ...	... 107	Harman, Dowling v ...	<i>App.</i> 1, 2
Gray, Leggo v ...	... 331	Harrington v Coxe 396, 398, <i>App.</i> 40	
Great Northern Railway Co., The Attorney-General v ...	... 72	Harrington v Harte ...	... 265
Great Northern Railway Company, Watkins v 52, 54, 72, 73, 76		Harris v Beavan ...	... 482
Great Southern and Western Rail- way Company, Galgay v ...	53	Harrison v Andrews ...	... 339
Great Southern and Western Rail- way Co., Moore v 101, 102, 103		Harrison v Bevington ...	... 513
Greatrex, Plunkett v... ..	... 182	Harrison v Bush ...	201, 283
Green, Cole v ...	... 90	Harrison v Harrison ...	... 516
Green, Hall v ...	... 516	Harrison v Stickney ...	447, 457
Green v Salmon ...	... 272	Harte, Harrington v ...	... 265
Greening v Wilkinson <i>App.</i> 44		Hartnett, Cahill v ...	... 442
Greenway, Patrick v... ..	... 119	Harvey v Brydges ...	... 309
Gregory, Doe v ...	349, 354	Harvey v Francis ...	... 447
Gregory v Elvidge ...	... 360	Harwood v Lester ...	... 165
Grenfell v Girdlestone ...	... 241	Hatchell v Wyse ...	... 402
Grey v Pearson ...	... 297	Hatton v English ...	<i>App.</i> 33
Griffiths, Hyatt v ...	... 12	Haughton, Bewley v ...	484, 490
Grove, Hazeldine v ... 183, 504, 505		Haughton, Regina v ...	... 10
Groves, Rose v ...	... 51	Hawker, Wickham v... ..	... 481
Gryme, Purife v ...	... 479	Hawkins v Eckles ...	... 489
Gwinne v Poole ...	... 216	Hawkins, Somerville v	282, 284
Hackett, Howlett v ...	169, 170	Hay, Shearwood v 222, 293, 500, 502, 507	
Haigh, Brooks v ...	248, 258	Haylock v Sparke ...	... 183
Hall v Barry ...	... 321	Haynes, Rex v ...	... 422
Hall v Burgess ...	... 84	Hazeldine v Grove ... 183, 504, 505	
Hall, Gelan v ...	.. 181	Head, Hollingham v ...	... 238
Hall v Green ...	... 516	Heap v Tonge ...	463, 469
Hall, Lessee of Fawcett v ...	... 486	Hearsey v Pechell ...	161, 365
Hall v Palmer ...	... 379	Hellings, Meering v ...	... 136
		Henderson v Broomhead	... 219
		Henn, Ex parte ...	96, 97
		Herbert's case ...	... 447

TABLE OF CASES CITED.

ix

Heron, White v ...	... 402	Hughes, Whitehead v	<i>App.</i> 13
Hervey, Metcalf v ...	... 122	Hull v Bollard ...	... 91
Heslop, Blunt v ...	... 371	Hull, Doe d. Souther v	350, 354
Hewlins v Shippam ...	... 127	Hull, The Mayor of, v Horner	... 242
Hayman, Tagwell v ...	... 272	Hungerford, Collins v	... 502
Higgon, Young v ...	... 371	Hunt, Grady v ...	... 182
Hill v Gray ...	... 107	Hunter v Allen ...	204, 209
Hill, Lawrenson v ...	<i>App.</i> 5, 6	Hurst v Jennings ...	... 396
Hill, Mill v ...	... 142	Hussey, Saunders v ...	... 482
Hillas, In re ...	... 266	Hutchins v Brown ...	... 540
Hilliard, Kennedy v ...	... 219	Hutchinson, Featherston v	... 380
Hinks, Gorman v ...	<i>App.</i> 40	Hutton, Bright v ...	... 446
Hippesley's case ...	... 386	Huzzey v Field ...	... 96
Hiscocks v Kemp ...	... 397	Hyatt v Griffiths ...	... 12
Hithcock, Attorney-General v	238, 512	Imperial Gas-light Co., Church v	84
Hobson v Middleton ...	... 482	Inge, Liggins v ...	... 127
Hobson v Neale ...	... 268	Inglis, Morley v ...	<i>App.</i> 43
Hodgens, Lessee Warrington v	... 7	In re Burdon ...	... 90
Hodgkinson v Fernie...	330, 334	In re Dunscombe ...	<i>App.</i> 15
Hodgson v Scarlett	205, 207, 208, 224, 225, 227	In re Hillas ...	... 266
Hogg, Spong v ...	... 516	In re Jennings ...	142, 149
Holden, Rex v ...	... 314	In re M'Donnell ...	... 538
Holland, Anster v ...	<i>App.</i> 13	In re Monsell ...	142, 149
Hollingham v Head ...	... 238	In re Wainewright	401, 406, 411, 413, 415, 419
Holloway v Clarkson...	... 266	Irwin v Osborne ...	... 136
Holme, Dodd v ...	... 118	Ives, Fairman v ...	... 207
Holmes, Banks v ...	... 330	Ivie, Warburton v ...	... 143
Holmes v Seller ...	247, 260, 479	Jack d. M'Quirk v Reilly	... 8
Home, Jack d. Thompson v	... 11	Jack d. O'Brien v Tiernan	... 8
Hopkins, Davies v ...	... 542	Jack d. Thompson v Home	... 11
Hopkins, Staniland v...	301, 302	Jack d. Warner v Martin	... 35
Horn v Thornborough	... 181	Jackson v Saunders ...	... 38
Horner, The Mayor of Hull v	... 242	James, Doe d. Price v	... 439
Horsley, Doe d. Bias v	... 116	James v Thomas ...	398, 399
Howard v Gossett ...	... 182	Jefferies, Cheek v ...	... 142
Howard v Shipley ...	... 516	Jenkins v Keymis ...	... 463
Howell v Stephens ...	... 542	Jenkins, Martin v ...	... 509
Howlett v Hackett ...	169, 170	Jennings, Hurst v ...	... 396
Hubbart v Phillips ...	<i>App.</i> 13	Jennings, Mules v ...	... 268
Huggitt v Montgomery	... 308	Jennings, Re ...	142, 149
Hughes, The King v...	314, 315, 316, 317	Jersey, Earl of, Llewellyn v	152, 156
		Jevons, Edwards v ...	... 258

TABLE OF CASES CITED.

Jodrell v Jodrell	...	379	King, The, Symmers v	...	315
Joel, Paul v	...	446	Kirby v Simpson	...	502, 504
Johnson v Lansley	...	136	Kircaldy, Egan v	...	162, 359, 363
Johnston, Roach v	...	485, 486	Kisbey v Chester and Holyhead		
Jones v Chapman	...	<i>App.</i> 37	Railway Company	165, <i>App.</i> 49	
Jones, Delany v	...	284	Knight, Orson v	...	142
Jones, Goodtitle v	...	509	Lade, Wallace v	...	142
Jones, Rex v	...	516	Lake v King	...	205, 215, 216
Jones v Waite	...	379	Lake, Wood v	...	127
Joy v Kekewich	...	122	Lalor v Bland	...	182
Kaye, Mure v	...	118	Lambe v Reaston	...	154
Kekewich, Joy v	...	122	Lambert, Mayor of Nottingham v	...	509
Kelly, Rogers v	...	<i>App.</i> 13	Lamley, Ram v	...	213
Kemmis, Lessee of Lord Trimles-			Lamine v Dorrell	...	<i>App.</i> 43
ton v	...	218, 447	Lancaster Canal Co., Parnaby v	...	118
Kemp, Hiscocks v	...	397	Land, Williams v	...	165
Kennedy v Hilliard	...	219	Langford v Selmes	...	33
Kent v Bird	...	136	Langridge, Wills v	...	507
Kent, Drury v	...	321	Lansley, Johnson v	...	136
Kent, The Justices of, The King v	...	82	Larkin v Lawder	...	162
Kent's, Sheriff of, case	...	386, 388, 390	Larne, Trickey v	...	107
Kett v Robinson	...	164, <i>App.</i> 49	Latham, Rex v	...	316
Keymis, Jenkins v	...	463	Latham v Rutley	...	<i>App.</i> 46
Keys v The Belfast and Ballymena			Lavey, Regina v	...	216
Railway Company	...	<i>App.</i> 46	Law v Dodd	...	508
Kiernan, Ruckley v	...	182, 283, 482, <i>App.</i> 6	Lawder, Larkin v	...	162
King, Doe d. Prosser v	...	<i>App.</i> 13	Lawder, Norris v	...	239
King v Everdon	...	407	Lawless v Queale	...	350
King, Gaskell v	...	379	Lawrenson v Hill	...	<i>App.</i> 5, 6
King, Lake v	...	205, 215, 216	Leadbitter, Wood v	...	127
King, The, v Hughes	...	314, 315, 316, 317	Leary v Patrick	...	182, 187, 188
King, The, v Mein	...	315	Leathley v Carey	...	<i>App.</i> 20
King, The, v The Inhabitants of			Le Blanc, Cooper v	...	<i>App.</i> 10
Birmingham	...	90	Leggo v Gray	...	331
King, The, v The Justices of Kent	...	82	Legge v Tucker	...	<i>App.</i> 46
King, The, v The Justices of Lei-			Legh, Oswald v	...	240
cester	...	89	Lee, Fonblanque v	...	142, <i>App.</i> 33
King, The, v The Mayor of Mon-			Lee, Webber v	...	331
mouth	...	314	Leicester, The Justices of, The		
King, The, v Skinner	...	207	King v	...	89
King, The, v Smith	...	314	Lench v Lench	...	245
			Lendrick, Grattan v	...	314
			Leonard, M'Mahon v...	...	447

TABLE OF CASES CITED.

xi

Lessee of Black v Davis	... 14	Low, Power v	396, 398, <i>App.</i> 40
Lessee Clanmorris v Burke	... 11	Lowten, Parkhurst v...	... 123
Lessee Lord Trimlestown v Kemmis	218	Loxdale, Rex v	... 89
Lessee M'Donnell v Murphy	... 142	Luckett v Bright	... 550, 551, 556
Lessee Porter v French	... 6	Luckett, Downing v	... 559, 561
Lessee of Warren v Martin	11, 13	Luckett, Toms v	... 549, 560
Lessee Warrington v Hodgens	... 7	Lyde v Barnard	... 406
Lester v Garland	... 370	Lyn v Wyn	... 423
Lester, Harwood v	... 165	Lynch, Burnett v	... <i>App.</i> 46
Lethbridge, Chichester v	... 51	Lynch, Wytham v	... 404, 407, 417
Lewis, Earl Cawdor v	<i>App.</i> 23	Lyon v Reed	... 6
Lewis v Willis	... 84, 85	Lysaght, Boyle v	... 38
Leyland, Regina v	... 302	M'Awley, Turner v	... 340
Lickbarrow v Mason	... 447	M'Cabe, Corcoran v	... 561
Lidwell, Roe v	... 152, 153, 158	M'Cabe's case	... 549, 552
Liggins v Inge	... 127	M'Carthy, Bead v	... <i>App.</i> 32
Lindsay v O'Neill	... 182	M'Court, M'Neal v	... 85
Lipscombe, Darnley v	<i>App.</i> 17	M'Donnell, In re	... 538
Little v Clements	... 181	M'Donnell, Lessee, v Murphy	... 142
Little v Poole	... 132	M'Dougall v Patterson	... <i>App.</i> 26
Little v The Dublin and Drogheda Railway Company	... 53	M'Dowell, O'Flaherty v	... 421, 423
Llewellyn v Earl of Jersey	152, 156	M'Elwaine v Mercer	... 136
Lloyd, Ward v	... 122	M'Gavin v Steward	... 447
Lock, Doe v	... 481	M'Kay, The Queen v	... 96
Logan v The Earl of Courtown	... 298	M'Lester v Quin	... 227
Lomas, Freeman v	... 340, 342	M'Mahon v Burchell...	... 340
London, Corporation of, The At- torney-General v	... 170	M'Mahon v Leonard	... 447
London Dock Company, Osborn v	123	M'Nally, Young v	... 11
London and North Western Railway Company v Bradley	... 52	M'Neal v M'Court	... 85
London and North Western Railway Company, Sharrod v	... 308	M'Ternan, Moffatt v	... <i>App.</i> 25, 26
London and North Western Railway Company v Smith	... 52	Mackay v Mackreth	... 9, 39
London and South Western Railway Company, Ellis v	... 309	Mackey v Alcock	... 397
Long v Barrett	... 447	Mackreth, Mackay v	... 9, 39
Long v Watkinson	... 260	Madden v Bryan	... 483, 488, 489, 490
Longridge, Underhill v	... 419	Maddox, Seymour v	... 282
Loveland d. Roberts v Thrustout	12	Maldon's case	... 247, 260
Loveland, Warburton v	... 297	Malkin, The Attorney-General v	... 266, 268, 272, 273
		Mallet, Brown v	... 282
		Malmsbury, The Queen v	... 360, 361
		Maloney v Bartley	... 213, 224
		Manchester, Earl of, v Vale	... 321
		Manchester, The Mayor of, Beavan v	... 119

Manesty, Morris v ...	404	Montgomery v Byrne	<i>App.</i> 40
Manners, The Attorney-General v	268	Montgomery, Huggitt v	... 308
Marriott, Batty v ...	... 136	Montgomery v Montgomery	<i>App.</i> 13
Marshall, Young v ...	<i>App.</i> 43	Moon v Durden	... 447
Martin, Erdy v ...	... 447	Moor v Roberts	... 122
Martin, Jack d. Warner v	.. 35	Moore v The Great Southern and Western Railway Company	101, 102, 103
Martin v Jenkins	... 509	Moore, Winton v	<i>App.</i> 18
Martin v Strong	... 284	Morell v Fisher	... 154
Martin v Upcher	... 500	Morgan, De Saily v	... 513
Mason, Lickbarrow v	... 447	Morgan v Ruddock	292, 293, 500, 507
Masters, Doe d. Harris v	... 115	Morley v Inglis	<i>App.</i> 43
Mathews v Carey	... 489	Morley v Praynell	... 101
May, Regina v	... 302	Morphy's case	... 537
Maynell v Saltmarsh	... 101	Morrice, Pearse v	... 89
Mead v Robinson	... 516	Morris v Manesty	... 404
Mearing v Hellings	... 136	Morton, Regina v	... 302
Meekins v Smith	... 388	Mosley v Richardson	... 107
Mein, The King v	315, 316	Mosse's case	... 321
Melluish v Collier	238, 513	Moulton v Clapham	... 204
Melville's, Lord, case	... 516	Mountain, Cave v	181, 182, 194, 195
Mercer, M'Elwaine v	... 136	Mucklow, Emery v	<i>App.</i> 13
Meredith, Sanders v	... 240	Mules v Jennings	... 268
Meres v Ansell	... 258	Mure v Kaye	... 118
Messenger, Hammond v	340, 342	Murphy, Delacour v	396, <i>App.</i> 40
Metcalf v Harvey	... 122	Murphy, Lessee M'Donnell v	... 142
Meyler's case	... 533	Murphy, Spratt v	... 483, 484, 489
Micklethwaite, Spilsbury v	... 485	Murray v The Earl of Stair	398, 399
Middleton, Hobson v...	... 482	Musson, Regina v	... 154
Midland Railway Company, Barrett v	309	Nairn v Prowse	463, 470
Mill v Hill	... 142	Nangle, Bell d. Smyth v	... 8
Miller v Salomons	297, 403, 406, 412, 415	Neale, Hobson v	... 268
Miller, Finch v	... 12	Nepean v Doe	... 350
Miller v O'Brien	... 164	Newman v Hardwicke	... 371
Milton, Rex v	... 435	Newton v Constable	387, 389, 391
Mitchell v Forster	... 371	Newton, Reynolds v	... 386
Mitton, Roe d. Hamerton v	463, 469	Noakes, Rex v	... 516
Moffatt v M'Ternan	<i>App.</i> 25, 26	Norris v Lawder	... 239
Moneyppenny v Prendergast	... 338	Norris, Sawyer v	... 170
Monmouth, Mayor of, The King v	315	North Curry, The Inhabitants of, Rex v	<i>App.</i> 26
Monsell, Re	142, 149	North, Potter v	... 321
Montague, Brook v	224, 225		

TABLE OF CASES CITED.

xiii

North Staffordshire Railway Com- pany v Dale 77	Patterson, Dunston v <i>App.</i> 26
Nottingham, Mayor of, v Lambert 509	Patterson, M'Dougall v <i>App.</i> 26
Nowlan v Gibson ... <i>App.</i> 10	Paul v Joel ... 446
O'Brien, Miller v ... 164	Payne v Brigham ... 482
O'Brien v Tylee ... 142	Pearse v Morrice ... 89
O'Connor v Spaight ... <i>App.</i> 22	Pearson, Grey v ... 297
O'Connor v Wallen ... 284	Pechell, Hearsey v ... 161, 365
O'Flaherty v M'Dowell 421, 423	Peck, Brown v ... 379
Ogilvy, The Caledonian Railway Company v ... 53	Pellecatt v Angell ... 186
Ognel's case ... 153	Pepper, Rourke v ... 182
O'Grady, White v ... 402	Perkins, Doe v ... 350
O'Hara, Davis v ... 486	Perkins, Wansey v ... 559, 561
Oldroyd, Rex v ... 513	Peters v Soame ... 340
O'Neill, Lindsay v ... 182	Petrie, Benfield v ... 516
Onions v Bowdler ... 541, 542	Philips, Doe d. Wilson v ... 115
Orchard v Coulsting <i>App.</i> 12	Philips v Evans ... 331
Orson v Knight ... 152	Philips v Pound ... 387
O'Ryan, Gason v ... 86	Phillips, Coust v ... 142, 143
Osborn v London Dock Company 123	Phillips, Hubbart v <i>App.</i> 18
Osborn, Rolle v ... 327	Phippen, Regina v ... 302
Osborne, Irwin v ... 136	Pierce v Ellis ... 282
Oswald v Legh ... 240	Pierse v Sharr ... 9
Owens, Saunders v ... 246	Piggott v Stratton ... 45
Oxfordshire's, Sheriff of, case 386, 388	Pike, Doe d. Beadon v ... 8
Packer, Thomas v 2, 9, 10, 13, 14, 19, 27, 30, 31, 34, 39, 41, 43, 114, 115, 116	Pike v Eyre ... 9
Packhurst, Dormer v ... 405	Pike, Flint v ... 228
Page, Crowley v ... 513	Pike, Gibbs v ... 207
Palmer, Doe d. Eyre v ... 350	Pilgrim v The Southampton and Dorchester Railway Co. v ... 54
Palmer, Hall v ... 379	Pincke, Shove v ... 479
Pape, Dickson v ... 268	Pittard, Forward v <i>App.</i> 46
Parker v Lessee of Dormer ... 481	Platt, Coles v ... 321, 328
Parkhurst v Lowten ... 123	Platt v Routh ... 268
Parnaby v The Lancaster Canal Company ... 118	Plummer, Branley v ... 143
Parry, Regina v ... 301	Plunket, Potts v ... 282
Parsons v Alexander ... 136	Plunkett v Greatrex ... 182
Paternoster, Webb v ... 127	Polkinghorne, Rowe v 238, 241
Patrick v Greenway ... 119	Pollitt v Forrest ... 480
Patrick, Leary v 182, 187, 188	Poole, Gwinne v ... 216
	Poole, Little v ... 132
	Pooley, Slatterie v ... 350
	Porter, Lessee, v French ... 6
	Porter, Lessee of, v French ... 486

Porter, Sacheverell v	321, 326	Regina v Christopher	... 181
Potter v North	... 321	Regina v Finnegan	... 314
Potts v Plunket	... 282	Regina v Haughton	... 10
Potts v Smedly	... 559	Regina v Inhabitants of Bolton	... 559
Poulter's case	... 406	Regina v Justices of Salop	... 371
Pound, Phillips v	... 387	Regina v Lavey	... 216
Powell, Cutter v	... 107	Regina v Leyland	... 302
Power v Lowe	396, 398, <i>App.</i> 40	Regina v May	... 302
Pratt, Evans v	... 136	Regina v Morton	... 302
Praynell, Morley v	... 101	Regina v Musson	... 154
Prendergast, Collis v	<i>App.</i> 22	Regina v Parry	... 301
Prendergast, Moneypenny v	... 338	Regina v Phippen	... 302
Pretty v Butler	... 321	Regina v Reynolds	... 301, 314
Price, Rogers v	... 272	Regina, Rowley v	... 302
Price v Seeley	... 434	Regina v Scott	... 72
Priestley v Fowler	... 118	Regina v Stubbs	... 520
Fritchard, Smith v	... 501	Regina v Sutton	... 182
Proone, Richley v	<i>App.</i> 20	Regina v The Eastern Counties	
Prowse, Nairn v	463, 470	Railway Company	52, 53
Pulvertoft v Pulvertoft	... 469	Regina v The South Eastern Rail-	
Purifie v Gryme	... 479	way Company	... 54
Pyke v Eyre	... 143	Regina v Whitewell	... 302
Pym v Campbell	... 255	Reilly, Jack d. M'Quirk v	... 8
Queale, Lawless v	... 350	Reilly's case	... 538
Queen's, The, case	... 513	Rennick v Armstrong	... 142
Queen, The, v M'Kay	... 96	Revis v Smith	205, 207, 208, 224
Queen, The, v Malmsbury	360, 361	Re Wright	<i>App.</i> 34
Quin, M'Lester v	... 277	Rex v Barnard	... 516
Raleigh, Birch v	... 516	Rex v Birnie	... 434
Ram v Lamley	... 213	Rex v Cator	... 421
Ramsbottom, Doe v	... 33	Rex v Davis	... 421
Rawson v Samuel	340, 342, <i>App.</i> 22	Rex v Durham	... 516
Read, Burling v	<i>App.</i> 37	Rex v Farler	... 516
Reade, Adams (in error) v	... 380	Rex v Haynes	... 422
Reaston, Lambe v	... 154	Rex v Holden	... 314
Rede v Farr	... 7	Rex v Jones	... 516
Redgwit, Aier v	... 209	Rex v Latham	... 316
Reed, Lyon v	... 6	Roe v Lidwell	152, 153, 158
Regina v Aberdare Canal Co.	... 371	Rex v Loxdale	... 89
Regina v Anderson	... 303	Rex v Mein	... 316
Regina v Barton	... 187	Rex v Milton	... 435
Regina v Bolton	... 182	Rex v Noakes	... 516
Regina v Bower	... 302	Rex v Oldroyd	... 513

TABLE OF CASES CITED.

xv

Rex v Sheehan ...	516, 520	Routh, Platt v ...	... 268
Rex v Skinner ...	... 222	Rowcliffe, Wood v ...	... 154
Rex v The Inhabitants of North Curry ...	<i>App.</i> 26	Rowe v Polkinghorne	238, 241
Rex v Wilkes ...	434, 516	Rowe v Young ...	... 485
Reynolds v Newton ...	... 386	Rowlands, Cope v ...	.. 132
Reynolds, Regina v ...	301, 315	Rowley v Regina ...	... 302
Reynolds, Wauchob v ...	... 559	Robinson, Timmins v...	... 11
Rice v The Dublin and Wicklow Railway Company	359, 364	Roxborough, Ring v ...	<i>App.</i> 43
Richards, Coxhead v ...	... 284	Royal Exchange Insurance Com-pany, Alcock v ...	... 237
Richards v Easto ...	... 507	Ruckley v Kiernan	182, 283, 482, <i>App.</i> 6
Richardson, Mosley v ...	... 107	Ruddock, Morgan v	292, 293, 500, 507
Richley v Proone ...	<i>App.</i> 20	Rusk, Baker v ...	... 516
Ricketts v Turquand	156, 157	Rutland's, Countess of, case	<i>App.</i> 44
Rigden, Brett v ...	... 492	Rutley, Latham v ...	<i>App.</i> 46
Ring v Roxborough ...	<i>App.</i> 43	Ryal v Ryal ...	... 245
Riordan, Clarke v ...	<i>App.</i> 2	Ryan, Gason v ...	... 85
Roach v Johnston ...	486, 486	Sacheverell v Porter ...	321, 326
Roberts, Bigg v ...	... 242	Salaman v Donovan ...	<i>App.</i> 14
Roberts, Moor v ...	... 122	Salmon, Green v ...	... 272
Robinson, Kett v ...	164, <i>App.</i> 49	Salomons, Miller v	297, 403, 406, 412, 416
Robinson, Mead v ...	... 516	Salop, Justices of, Regina v	... 371
Robinson v Roland ...	... 292	Saltmarsh, Maynell v	... 101
Robinson, Stanford v...	... 447	Samuel, Rawson v	340, 342, <i>App.</i> 22
Robinson, Verrall v ...	<i>App.</i> 49	Sanders v Meredith ...	... 240
Robinson v Waddington	... 371	Sanders v Vanzeller ...	... 509
Robson, Doe d. Chandless v	... 115	Sandford, Custis v ...	<i>App.</i> 23
Robson v Eaton ...	<i>App.</i> 13	Saunders v Hussey ...	... 482
Roe d. Hamerton v Mitton	463, 469	Saunders, Jackson v ...	... 38
Roe, Doe d. Shepherd v	<i>App.</i> 13	Saunders v Owens ...	... 246
Roe v Ferrars ...	... 350	Saville, Goodtitle d. Luxmore v	... 115
Roe v Vernon ...	... 154	Sawyer v Norris ...	... 170
Rogers v Kelly ...	<i>App.</i> 13	Scarlett, Hodgson v	204, 207, 208, 224, 225, 227
Rogers v Price ...	... 272	Scott v Anderson ...	<i>App.</i> 43
Rogers v Rogers ...	... 380	Scott v Bell ...	... 463
Roland, Robinson v ...	... 292	Scott, Doe v ...	... 349
Rolle v Osborn ...	321, 327	Scott Ede v ...	... 282
Ronalds, Fisher v ...	... 122	Scott v Gilmore ...	... 380
Rose v Groves ...	... 51	Scott, Regina v ...	... 72
Roundel, Foster v ...	... 360	Sedgwick, Aire v ...	209, 213
Rourke v Pepper ...	... 182	Sedgwick, Ayres v	211, 212, 223, 224
Rourke v Short ...	136, 137		

Sedgewicke, Eyres v ...	... 203	Smith, Revis v	205, 207, 208, 224
Seeley, Price v ...	... 434	Smith, Rex v ...	... 516
Selby v Eden ...	485, 486	Smith v Spooner ...	... 116
Seller, Holmes v ...	247, 260, 479	Smith, Strachan v ...	... 84
Selmes, Langford v ...	... 33	Smith, The King v ...	... 315
Selway v Fogg ...	... 106	Smith, The London and North Western Railway Company v	52
Seymour, Caudle v	182, 185, 188, 434	Smith v Williams ..	... 447
Seymour v Madden ...	... 282	Smith v Young ...	<i>App.</i> 49
Sharpe v Wagstaffe	294, 484, 500	Soame, Peters v ...	... 340
	502, 507	Solomon v Turner ...	... 107
Sharr, Pierse v ...	... 9	Somerville v Hawkins	282, 284
Sharrod v The London and North Western Railway Company ...	308	South Eastern Railway Company, Regina v ...	... 54
Shaw, Corner v ...	... 272	South Staffordshire Railway Com- pany v Hall ...	... 52
Shawcross, Doe d. Laurence v ...	115	South Wales Railway Company, Tanner v ...	53, 72
Shearwood v Hay	292, 500, 502, 507	South Western Railway Company, Attorney-General v ...	54
Sheehan v Dorman ...	... 359	Southampton and Dorchester Rail- way Company, Pilgrim v ...	54
Sheehan, Rex v ...	516, 520	Southern, Goodtitle v ...	... 154
Sheehy v Dormer ...	363, 364	Spaight, O'Connor v ...	<i>App.</i> 22
Sheehy v Dorman ...	... 161	Sparke, Haylock v ...	... 183
Shenton v Corbally	6, 12, 13, 40, 45	Sparks' case ...	9, 22, 28, 29, 36
Shipley, Howard v ...	... 516	Sparks v Sparks ...	... 33
Shippam, Hewlins v ...	... 127	Spicer v Todd ...	<i>App.</i> 13
Shove v Pincke ...	... 479	Spilsbury v Micklethwaite	... 435
Short, Rourke v ...	186, 137	Spitty, Curtis v ...	84, 85
Shortrede v Cheek ...	... 258	Spong v Hogg ...	... 516
Silly v Dally ...	... 482	Spooner, Smith v ...	... 116
Sim v Edwards ...	... 339	Spratt v Murphy ...	483, 484, 489
Simpson, Fleming v ...	... 107	Spyring, Twogood v ...	201, 282, 284
Simpson, Kirby v ...	502, 504	Stafford's, Lord, case...	... 8
Simpson, The King v	207, 222	Stair, The Earl of, Murray v	398, 399
Slack, Cowlam v ...	... 321	Stallwood, Tharpe v ...	... 439
Slade, England v ...	... 33	Standen v Edwards ...	... 516
Slatterie v Pooley ...	... 350	Stanford v Robinson ...	... 447
Smedly, Potts v ...	... 559	Staniland v Hopkins ...	301, 302
Smith, Atkinson v ...	... 463	Stanion, Doe d. Gray v	<i>App.</i> 8, 9
Smith, Becke v ...	... 297	Stanley v Coursep ...	... 212
Smith, Bentley v ...	... 509	Stanley v Curson ...	212, 223
Smith v Bond ...	... 399		
Smith, Doe d. Broomfield v	... 41		
Smith, Ex parte ...	... 340		
Smith, Meekins v ...	... 388		
Smith v Pritchard ...	... 501		

TABLE OF CASES CITED.

xvii

Stephens, Doe d. Naylor v	... 142	Thomas, Tyne v	... 132
Stephens, Ex parte	... 340	Thompson, Attenborough v	<i>App.</i> 25
Stephens, Howell v	... 542	Thompson, Whalley v	... 321
Stevens, Wilkins v	... 238, 240	Thornborough, Horn v	... 181
Steward, Cassidy v	... 447	Thorp, Allen v	... 266
Steward, M'Gavin v	... 447	Thrustout, Loveland d. Roberts v	12
Stickney, Harrison v	... 447, 457	Thurtell v Beaumont...	... 516
Stirling, Crawford v	<i>App.</i> 43	Tiernan, Jack d. O'Brien v	... 8
St. John v St. John	... 379	Timmins v Rowlinson	... 11
Stockton and Darlington Railway Company, Barrett v	... 268	Tisdale v Essex	... 479
Stone, Frew v	... 164, <i>App.</i> 49	Todd, Spicer v	<i>App.</i> 13
Strachan v Smith	... 84	Toke, Weller v	... 181
Strading, Sylleran v	... 85	Tomkins v Ashby	... 268
Stratton v Codd	<i>App.</i> 40	Tommey v White	... 447
Stratton, Doe d. Tilt v	... 41	Toms v Lockett	... 549, 560
Stratton, Piggott v	... 45	Tonge, Heap v	... 463, 469
Strickland, Doe d. Strickland v	... 8	Topham v Braddick	<i>App.</i> 35
Strong, Martin v	... 284	Tregono, Arundell v	... 223
Strut v Blay	... 107	Trickey v Larne	... 107
Stubbs' case	... 525	Trimlestown, Lord, Lessee of, v Kemmis	... 218, 447
Stubbs, Rex v	... 516, 520	Tripp v Frank	... 96
Stukeley v Butler	... 153	Trotman v Dunn	... 213, 224
Styring, French v	... 136	Tubbledy, Considine v	... 340
Sullivan v Sullivan	... 380, <i>App.</i> 12	Tucker, Legge v	<i>App.</i> 46
Sussex Peerage case	... 298	Tuff v Warman	... 309
Sutherland v Willis	... 447	Tuite, Austin v	... 502
Sutton, Regina v	... 182	Turner v M'Awley	... 340
Swan, Goldshede v	... 248, 257, 258	Turner, Solomon v	... 107
Sylleran v Strading	... 85	Turquand, Armstrong v	... 339, 343
Symmers v The King...	... 315	Turquand, Ricketts v...	... 156, 157
Tagwell v Heyman	... 272	Tuson v Evans	... 284
Tancred v Christy	... 510	Twogood v Spyring	... 201, 282, 284
Tanner v The South Wales Rail- way Company	... 53, 72	Tylee, O'Brien v	... 142
Taylor, Alcock v	... 501	Tyne v Thomas	... 132
Taylor, Borrough v	... 115	Tyrringham's case	... 321
Taylor, Carr v	... 340	Underhill v Longridge	... 419
Tenant v Brown	... 278, 360, 364	Underwood v Courtown	... 143
Tharpe v Stallwood	... 439	Upcher, Martins v	... 500
Thomas, James v	... 398, 399	Vale, Earl of Manchester v	... 321
Thomas v Packer	2, 9, 10, 13, 14, 19, 27, 30, 31, 34, 39, 41, 43, 114, 116	Vanzeller, Sanders v	... 509
		Vernon, Roe v	... 154
		Verrall v Robinson	<i>App.</i> 49

Von Sandau v —	... 399	Webber v Lee	... 331
Waddington, Robinson v	... 371	Wedge v Berkeley	... 181
Wade, Bainbridge v	... 257	Weller v Toke	... 181
Wagstaffe, Sharpe v	294, 484, 500, 502, 507	West v Cooke	<i>App.</i> 1
Wainwright, In re	401, 406, 411, 413, 415, 419	Westmeath's, Lord, case	... 383
Waite, Jones v	... 379	Weston v Dobinet	203, 209, 223
Wakefield, Edwards v	... 122	Westover v Daubinet	... 203
Waldron, Garrett v	... 173, 174	Whalley v Thompson...	... 321
Wall, Blacket v	... 240	Whateley v Crowter	... 122
Wallace, Dowling v	<i>App.</i> 35	Whimper, Daking v	... 463
Wallace v Lade	... 142	White v Carter	... 183
Wallen, O'Connor v	... 284	White v Heron	... 402
Walrond v Walrond	... 380	White v O'Grady	... 402
Walsh v Feely	... 486	White, Tommey v	... 447
Wansey v Perkins	... 559, 561	Whitehead v Hughes	<i>App.</i> 13
Warburton v Ivis	... 143	Whitewell, Regina v	... 302
Warburton v Loveland	... 279	Wickham v Hawker	... 481
Ward v Denn	... 380	Wildes, Cooke v	... 284
Ward v Lloyd	... 122	Wilkes, Rex v	434, 516
Ward, Willis v	... 321	Wilkins v Stevens	238, 240
Waring, Wynne v	240, 241	Wilkinson, Greening v	<i>App.</i> 44
Warman, Tuff v	... 309	Willause v Gorges	... 241
Warne, Davey v	... 501	Williams, Brennan v	<i>App.</i> 17, 18
Warner, Lessee of, v Martin	11, 13	Williams, Doe v	... 349
Warren v Wyse	... 402, <i>App.</i> 15	Williams v Douglas	... 227
Warrington, Ex parte	... 421	Williams v Land	... 165
Warrington, Lessee, v Hodgins	... 7	Williams, Smith v	... 447
Waterpark, Lord, v Fennell	... 154	Willis, Lewis v	84, 85
Watkins v The Great Northern Railway Co.	52, 54, 72, 73, 76	Willis, Sutherland v	... 447
Watkinson, Long v	... 265	Willis v Ward	... 321
Watson v Atlantic Steam Navigation Company	... <i>App.</i> 49	Willis v Willis	... 245
Watson, Dickenson v	... 307	Wills v Langridge	... 507
Watson's case	... <i>App.</i> 49	Wilson, Brice v	... 272
Watts v Christie	... 339	Wilson v Wilson	379, 385
Watts v Friend	... 132	Winter v Brookwell	... 128
Watts, Woodward v	... 406	Winter, Fladong v	240, 241
Wauchob v Reynolds	... 559	Winton v Moore	... <i>App.</i> 18
Webb, Clarke v	... 84	Wise, Dubois v	... 386
Webb v Paternoster	... 127	Witham v Earl of Derby	... 509
		Wodehouse v Fairbrother	339, 341, 344
		Wood, Buckley v	212, 215, 216, 229
		Wood v Lake	... 127
		Wood v Leadbitter	... 127

Wood v Rowcliffe ...	... 154	Wyse, Warren v ...	402, <i>App.</i> 15
Woodgate, Wright v ...	... 284	Wytham v Lynch ...	404, 407, 417
Woodrooffe, Doe d. Daniell v ...	... 7	Youghal Union, Guardians of, v	
Woodward v Watts ...	... 406	Atkinson ...	<i>App.</i> 44
Wright v Beckett ...	... 513	Young v — ...	... 11
Wright, Re ...	<i>App.</i> 34	Young, Astley v ...	205, 214, 222
Wright v Woodgate ...	... 284	Young v Higgon ...	... 371
Wyatt Wyld's case ...	321, 325	Young v M'Nally ...	... 11
Wyn, Lyn v ...	... 423	Young v Marshall ...	<i>App.</i> 43
Wynne v Waring ...	240, 241	Young, Rowe v ...	... 485
Wyse, Duboise v ...	... 391	Young, Smith v ...	<i>App.</i> 49
Wyse, Hatchell v ...	... 402	Zouch v Empeey ...	... 371

COMMON LAW REPORTS,
OF CASES ARGUED AND DETERMINED IN
THE COURTS OF
QUEEN'S BENCH, COMMON PLEAS, EXCHEQUER,
Exchequer Chamber,

AND
COURT OF CRIMINAL APPEAL.

H. B. FOOT and E. T. WARREN, Executors of E. Carleton,
v.

K. WARREN, D. O'CALLAGHAN and others.*

EJECTMENT for non-payment of rent reserved by a lease dated the 30th of July 1782.—Defence: That the lands were not, at the time of issuing of the plaint, nor at any time since, nor are now, holden of the plaintiffs, or either of them, by defendants, or any of them, or by any person or persons, as tenants or tenant to the plaintiffs, or either of them, as in plaint mentioned. Issue thereon in the terms of the defence. The action was tried at Cork, before Greene, B., at the Spring Assizes 1858; when the plaintiffs proved an indenture of lease dated the 7th of November 1769, and duly registered, by which J. Nash demised to W. Withers part of the lands of Geganath or Windsor, in the barony of Barretts and county of Cork, for the term of 993 years from the 29th of September 1769,

at a profit-rent. Both the lives in the lease of 1761 being dead, that lease was renewed in 1794, to Nash's representatives, by C. O'Callaghan (heir-at-law of D. O'Callaghan, sen.), for the lives of two persons, the survivor of whom died in 1837. In 1807, C. O'Callaghan became assignee of Nash's interest. From 1823 to 1849, the assignees of Atkins' interest paid to D. O'Callaghan, jun. (heir-at-law of C. O'Cal-

M. T. 1858.
H. T. 1859.
Queen's Bench.

*Nov. 23, 24.
Jan. 14, 15.*

Exch. Cham.
E. T. 1859.
T. T. 1859.
*April 30.
May 2, 3, 28.*

By indenture in 1761, D. O'Callaghan, sen., demised lands to Nash for two lives, and such other lives as should for ever there-after be added, pursuant to the covenant for perpetual renewal therein. In 1769, Nash demised the same lands to Withers for 993 years; and in 1782, Withers demised the lands to Atkins for 950 years,

* *Coram LEFROY, C. J., PERRIN and O'BRIEN, JJ.*

M. T. 1858. at the yearly rent of £128. 8s. 5d., Irish currency. This lease
Queen's Bench.
FOOT
v.
WARREN. a covenant that it should be lawful for Denis O'Callaghan, sen.,
under whom J. Nash derived, his heirs, &c., to enter and view the
condition of the premises half-yearly; and also a covenant for quiet
enjoyment, without interruption by the lessor, his heirs, executors,
administrators or assigns, or any person claiming or to claim under
him or them. The plaintiffs also proved an indenture of lease,
dated 30th of July 1782, and duly registered, by which W. Withers
demised the same lands to W. Atkins for 950 years from the 25th of
March 1783, at the yearly rent of £200 Irish currency (equivalent
to £184. 12s. 4d. sterling), with similar provisos for distress and
for re-entry in the event of no sufficient distress; and with similar

laghan), as assignee of Nash's interest, the rent reserved by the lease of 1769, and
also, during the same period, paid to the representatives of Withers the profit-rent
reserved by the lease of 1782; but no rent was paid after 1849. In 1851,
D. O'Callaghan, jun., brought ejectment for non-payment of the rent reserved by
the lease of 1769, and recovered possession of the lands; but the representatives of
Withers were not served with O'Callaghan's ejectment. In 1858, Withers' repre-
sentatives having brought ejectment for non-payment of the rent reserved by the
lease of 1782:—*Held*, affirming the judgment of the Queen's Bench, that this eject-
ment was not maintainable, the tenancy, if any, being nothing more than a parol
yearly tenancy, created by overholding, and payment of rent from 1837.—
[*Prior, C. B., dissentiente.*]

The Irish statutable ejectment for non-payment of rent cannot be maintained
upon a tenancy created by a parol demise from year to year, express or implied.—
[*Prior, C. B., dissentiente.*]

Notwithstanding the covenant for perpetual renewal, by D. O'Callaghan, sen.,
in the lease of 1761, and even assuming that Nash and his representatives were
bound to keep up that lease by due renewals, in order to keep on foot the term of 993
years demised by Nash to Withers in 1769, the result, at Law, of the assignment of
Nash's interest to the heir-at-law of D. O'Callaghan, sen., in 1807, was to merge the
lease of 1761 and the renewal thereof in the reversion, and therefore, upon the fall of
the lives in that lease and renewal, to destroy the term of 993 years, which depended
thereon for its continuance, the doctrine of enlargement not being applicable to such
a state of facts, so as to keep the term subsisting.—[*Prior, C. B., dissentiente.*]

A tenancy which arises from overholding, and payment of rent after the expira-
tion of a lease, is a *parol* tenancy from year to year, arising by implication of law,
though regulated by such of the provisions of the expired lease as are applicable to
a tenancy from year to year.

The rule of Law, that, although the tenant is estopped from disputing the title of
the landlord under whom he has taken possession, yet he is at liberty to show that
the landlord's title has determined, applies to a statutable ejectment for non-payment
of rent, as well as any other species of action.

Per Monahan, C. J.—The 5 G. 2, c. 4, s. 4 (*Ir.*), applies only to surrenders of
existing leases, and not to cases where leases have determined at Law.

The object and effect of the Irish Ejectment Statutes considered.

Thomas v. Packer (1 H. & N. 669; S. C., 3 Jur., N. S., 143; 26 Law Jour.,
Exch., 207) considered in reference to the Irish Ejectment Statutes.

covenants for the inspection of the premises by W. Withers and the several head landlords, and for quiet enjoyment, as in the lease of 1769. The title of W. Withers was traced by the plaintiffs to Elizabeth Carleton his daughter; and it was proved that John Warren, who was tenant of the lands, and represented W. Atkins' interest under the lease of 1782, had, from 1823 to 1849, paid the yearly rents of £118. 10s. sterling to the defendant D. O'Callaghan, jun., the son and heir-at-law of C. O'Callaghan, and the grandson and heir-at-law of Denis O'Callaghan, sen., and of £66. 2s. 4d. sterling to the parties successively entitled under the will of W. Withers, viz., to his widow during her life, and, after her death, to his daughter Elizabeth Carleton, during her life; and, after her death, to the plaintiff E. T. Warren, her executor. These two rents amounted together to the rent of £184. 12s. 4d. sterling (equivalent to £200 Irish currency), reserved by the lease of 1782. But, from 1849, John Warren ceased to pay either of the said rents. The plaintiffs also proved the death of Elizabeth Carleton in 1847; and that they, as her executors, had duly proved her will; and they also gave in evidence the declaration in an action of covenant in 1852, for rent under the lease of 1769, against John Warren (therein averred to be assignee of the estate of W. Withers), by the defendant D. O'Callaghan, jun., as heir-at-law of his father C. O'Callaghan, therein averred to be assignee of the estate of J. Nash, by a deed alleged to bear date the 11th of February 1807, and to have been made between the trustees of the will of J. Nash and C. O'Callaghan, the father of the defendant D. O'Callaghan, jun.

The defendants proved an indenture of lease dated the 26th of November 1761, between Denis O'Callaghan, sen. (the grandfather of the defendant D. O'Callaghan, jun.) and J. Nash, by which, after reciting that Denis O'Callaghan, sen., was, by virtue of a lease dated the 12th of August 1723, and several renewals thereof, legally entitled to the whole of the lands of Geganath or Windsor, for the lives of J. Bennett, W. Withers and himself, and of such other persons as should be thereafter nominated, pursuant to the covenant for perpetual renewal therein contained, the said Denis O'Callaghan, sen., demised to J. Nash (the lessor in the lease of 1769) the whole

M. T. 1858.
Queen's Bench.

FOOT
v.
WARREN.

M. T. 1858.
Queen's Bench.

FOOT
v.
WARREN.

of the lands of Geganath, for the lives of the said J. Nash and J. Lane, and of the survivor of them ; provided the said J. Bennett, W. Withers and Denis O'Callaghan, sen., or any of them, should so long live, and during the lives of such other persons as should be nominated by J. Nash, as thereafter mentioned, at the yearly rent of £241. 3s., Irish currency. In this lease was contained a covenant by J. Nash, for ever thereafter, upon failure of the lives in the head lease, therein recited, or any renewal thereof, to pay the fines payable under the head lease, and to indemnify Denis O'Callaghan, sen., his heirs and assigns, therefrom ; and a covenant by Denis O'Callaghan, sen., that it should be lawful for J. Nash, his heirs and assigns, within six months after the death of either of the lives therein named, or of any of the lives to be thereafter named, if such death happened within the kingdom, and within four months after notice of such death, if it happened out of the kingdom, to nominate any new life or lives, by indenture to be affixed to the lease and its counterpart, or otherwise, and thereupon and upon payment of all arrears of the rent thereby reserved, and of all fines reserved by the head lease, that the demise then made should continue, and J. Nash, his heirs and assigns, should enjoy the lands for such life and lives for ever thereafter against the said Denis O'Callaghan, sen., his heirs and assigns, provided that the life or lives so to be added should not be the same life or lives as in the head lease. This lease also contained a proviso that, on default by the lessees thereunder in payment of the fines in the head lease for two years after they became due, it should be optional with Denis O'Callaghan, sen., his heirs and assigns, to renew or avoid the lease.

The defendants also proved a renewal of the lease of 1761, in 1794, by C. O'Callaghan, the heir-at-law of Denis O'Callaghan, sen. (the lessor in 1761), to the trustees of the will of J. Nash, for the lives of F. Arthur and S. Roche, in lieu of the lives of J. Nash and J. Lane, both of whom were therein recited to have been long since dead. It was admitted that S. Roche, who survived F. Arthur, died in 1837, and that the defendant D. O'Callaghan, jun., was the son and heir-at-law of the said C. O'Callaghan.

The defendants also gave in evidence the proceedings in an

action of ejectment by the defendant D. O'Callaghan, jun., in 1851, for non-payment of the rent reserved by the lease of 1769, to recover the lands demised by that lease; and proved that the defendant D. O'Callaghan, jun., on the 25th of March 1851, obtained possession of the lands under an *habere* issued on the judgment obtained in the action, and subsequently let to Harding, one of the defendants in the present action; but that ejectment, although served on John Warren and the occupying tenants, was not served upon the present plaintiffs, the assignees of the tenant, as required under the Process and Practice Act, by the 251st of the General Orders of 23rd December 1850. It was also proved that the arrear of rent, sued for in that ejectment, was not paid, and that there was not any distress upon the lands sufficient to satisfy it, at the time of executing the *habere*, or within a year after.

M. T. 1858.
Queen's Bench.
 FOOT
 v.
 WARREN.

The defendants also gave in evidence the proceeding in a cross-ejectment on the title by the present plaintiffs in 1856, to recover back the lands, the possession of which the defendant D. O'Callaghan, jun., had so obtained by the ejectment in 1851; and it appeared that the verdict had for the defendants in the ejectment in 1856, on the ground that there was an outstanding mortgage by W. Withers in 1783, was set aside, and a new trial granted; but that no further step had been taken in that action.

The learned Judge having directed the jury, on these facts, to find for the plaintiffs, the defendants thereupon excepted, and also called upon his Lordship to tell the jury that, if they believed the evidence of the defendants, they ought to find for them; and, his Lordship having declined so to do, the defendants thereupon excepted.*

Separate exceptions were taken by the defendants D. O'Callaghan, jun., and H. Harding, who held by lease from the defendant D. O'Callaghan, jun.

* **NOTE.**—The following points were noted for argument on the part of the defendants:—First, that, on the foregoing facts and documents, ejectment for non-payment of rent could not be maintained.

Secondly.—That the defendant D. O'Callaghan, jun., having got possession of the premises comprised in the lease of 1782, the defendants were now entitled to avail themselves of the forfeiture incurred by the non-payment of the rent reserved by the lease of 1769.

M. T. 1858. *H. J. Leslie* (with him *E. Sullivan*), for the defendant *D. O'Callaghan*, jun., in support of the exceptions.

Queen's Bench.

FOOT
v.

WARREN.

First.—The lives in the lease of 1761 had both dropped when that lease was renewed in 1794; but the lives named in that renewal have both dropped, and therefore that lease has no existence at Law, notwithstanding the covenant for renewal therein; and the lease of 1782 is, accordingly, also void at Law, because the duration of the term demised by it depended upon the continuance of the lease out of which it was carved: the plaintiffs, therefore, have no reversion at Law to maintain this ejectment under the Ejectment Statutes: *Lessee Porter v. French* (a). There is no question of estoppel, because an interest passed at Law by the lease, but which interest has now determined. Secondly.—This ejectment cannot be maintained under the Ejectment Statutes; because the lessee's interest in the lease of 1782 having determined, the tenancy which was created between the plaintiffs and the representatives of the lessee in that lease, by payment of rent, was merely a parol yearly tenancy, subject, by implication of law, to such of the terms of the expired lease as were applicable to such a tenancy. A tenancy, however, which arises from overholding and payment of rent, is not such a holding under an article, minute or contract in writing, as will allow of an ejectment being sustained under the Irish Ejectment Statutes: *Fur. Lan. and Ten.*, pp. 1139, 1140, ss. 68, 69; *Nap. Civ. B. Dig.*, p. 149; *Shenton v. Corbally* (b); and, even assuming that ejectment for non-payment of rent was maintainable on John Warren's parol tenancy, there is evidence of a surrender of that tenancy by operation of law, by his assent to the substitution of H. Harding in his place: *Lyon v. Reed* (c). A direction for the plaintiffs, therefore, was clearly wrong. Thirdly.—By reason of the non-payment of the rent reserved by the lease of 1769, assuming that lease and the sub-lease to be now existing, in 1851, D. O'Callaghan, jun., acquired a right at Common Law to enter for condition broken, by non-payment of rent on demand; and having obtained possession of the lands under the *habere*, he is now remitted to his rightful title to

(a) 9 Ir. Law Rep. 514.

(b) 1 Hogan, 403.

(c) 13 M. & W. 285.

enter for condition broken. He is, therefore, entitled to maintain his possession against the plaintiffs in the present ejectment: *Lessee Warrington v. Hodgens* (a); *Doe d. Daniell v. Woodroffe* (b). It is no objection that the Common Law demand for rent was not made; because two subsequent gales accrued due after possession was taken; and D. O'Callaghan, jun., being then in possession, a demand was impossible, and therefore excused: *Rede v. Farr* (c). A direction for the plaintiffs cannot, therefore, be sustained, and the exceptions must be allowed.

M. T. 1858.
Queen's Bench.
FOOT
v.
WARREN.

W. A. Eakam, for the defendant *H. Harding*, also in support of the exceptions.

Jellett and *H. B. Chatterton*, contra.

As against the defendants, the plaintiffs must be taken to have a subsisting legal estate in the lease of 1769, and are entitled to succeed in this ejectment; first, because, if the estate of J. Nash under the lease of 1761 had been duly kept up, the term granted in 1769 would be now a valid term at Law; but, in violation of the obligation of J. Nash to his lessee under the lease of 1769, the trustees of the will of J. Nash, in 1807, convey all their interest in the lands to C. O'Callaghan, who then represented the reversion of the lessor in the lease of 1761; and Nash's representatives and C. O'Callaghan, having together thus rendered impossible the due renewal of the lease of 1761, and consequently the subsistence at Law of the lease of 1769, the defendant D. O'Callaghan, jun., who claims through his father C. O'Callaghan, cannot now avail himself of an act which was wrongful as against the plaintiffs in the present action, and allege that the term granted in 1769 has determined at Law. On the contrary, in consequence of the renewal of 1794, by virtue of the 5 G. 2, c. 4, s. 4 (*Ir.*), and by the application of the doctrine of enlargement to this case, that term must be considered to be subsisting at present in the same way as it would be subsisting if J. Nash's estate had been duly kept up by successive renewals,

(a) Batty, 311.

(b) 2 H. L. Cas. 811.

(c) 6 M. & S. 121.

M. T. 1858. O'Callaghan's being the hand both to renew and to obtain the renewals: *Co. Lit.*, p. 216 *b*; *Lord Stafford's case* (a); *Perkins' Prof. Book*, fol. 766; *Fearne Cont. Remrs.*, p. 271; *Jack d. Queen's Bench.* *M'Quirk v. Reilly* (b); *Bell d. Smyth v. Nangle* (c); 5 G. 2, c. 4, s. 4; *Davenport's case* (d); *Doe d. Beadon v. Pike* (e).—[LEXFROX, C. J. That argument goes further than any case has yet gone on the point. The doctrine of enlargement will operate to enlarge an existing estate; or, if an estate is held upon a condition which becomes impossible, the estate thereupon ceases to be conditional, and becomes absolute: but that is no authority for saying that an estate which has determined can at Law, by the application of either of those principles, be again called into existence.]—Secondly.—The plaintiffs must be taken to have a subsisting legal estate, because rent was paid and received under the lease of 1782 down to 1849. In 1852, the defendant D. O'Callaghan, jun., declares upon the lease of 1769, in an action of covenant for the rent, treating it as a subsisting lease; and, if so, the lease of 1782, which was carved out of it, must be a subsisting lease also. That declaration is conclusive evidence against D. O'Callaghan, jun., the defendant, on this point; but it does not prejudice the present plaintiffs; because D. O'Callaghan's averment that J. Warren was the assignee of Withers' interest, being made without the privity of the plaintiffs, cannot affect them: *Doe d. Strickland v. Strickland* (f). Thirdly.—Whether the lease of 1769 be subsisting or not, this ejectment is maintainable under the Ejectment Statutes. The profit-rent under the lease of 1782 was paid by J. Warren to E. Carleton and the present plaintiffs from 1837, when the last life in the renewal of 1794 died, down to 1849; and, therefore, a yearly tenancy arose by this dealing between the plaintiffs and J. Warren, governed by the terms of the lease of 1782. The payment of the head-rent by J. Warren to the defendant D. O'Callaghan, jun., did not affect that yearly tenancy: *Jack d. O'Brien v. Tiernan* (g). The

(a) 8 Rep. 73 *b*.(b) 2 H. & B. 301, 307 *n.* (a).

(c) 2 Jebb & Sy. 629.

(d) 8 Rep. 144 *b*.

(e) 5 M. & S. 146.

(f) 8 C. B. 724.

(g) 1 Jebb & Sy. 117.

defendants therefore hold from the plaintiffs for the residue of a term of 950 years, if the plaintiffs' estate should so long continue: *2 Fur. Land. and Ten.*, p. 1121, s. 51; *Mackay v. Mackreth* (a); *Pike v. Eyre* (b); *Pierse v. Sharr* (c). This very case is stated as a case in which ejectment for non-payment of rent will lie: *2 Fur. Land. and Ten.*, p. 1142, s. 73, citing *Sparks' case* (d). The Ejectment Statutes apply to a yearly tenancy; for the word "lease," used in those statutes, is not confined to an instrument in writing; but, even admitting that the lease of 1782 is determined at law, yet the yearly tenancy which arose on its determination, by holding over and payment of rent, is a yearly tenancy governed by that lease; and, therefore, the holding is *under* a minute or contract in writing, within the meaning of the Ejectment Statute 25 G. 2, c. 13 (*Ir.*). The first Ejectment Statute, 11 Anne, c. 2, s. 2 (*Ir.*), applies to "*all cases between landlord and tenant*," where there is a right of re-entry, and more than half a year's rent is due, and no sufficient distress upon the premises. All those requisites are satisfied in this case: *Thomas v. Packer* (e); *Doe d. Thompson v. Amey* (f). The object of that statute was to dispense with the Common Law demand of the rent; and, in section 5, it is clearly shown to be intended to apply both to the case of *landlord* and also of *lessor*. The next statute, 4 G. 1, c. 5 (*Ir.*), renders it immaterial whether there be a sufficient distress upon the land or not, if more than one year's rent is in arrear; and, by a subsequent statute (g), if one year's rent or more is in arrear; but both these Acts apply to the case of a *landlord* or a *lessor*. All these statutes, being *in pari materia*, are to be construed as one code; and it has been held that a condition of re-entry must exist at law, in order to support an ejectment under these latter Acts. Under these statutes, therefore, which contem-

M. T. 1858.
Queen's Bench
FOOT
v.
WARREN.

(a) 4 Doug. 213.

(b) 9 B. & C. 909; S. C., 4 M. & Ry. 661.

(c) 2 M. & Ry. 418.

(d) Cro. Eliz. 676; S. C., Hedley, 73; Moore, 569.

(e) 1 H. & N. 669; S. C., 3 Jur., N. S., 143; 26 Law Jour., Exch., 207.

(f) 12 A. & E. 476; S. C., 4 P. & D. 177.

(g) 8 G. 1, c. 2 (*Ir.*).

M. T. 1858. *Queen's Bench.*
 FOOT
 v.
 WARREN.

plate tenancies which are not created by writing, as well as those which are, the present ejectment is maintainable. The next statute is 5 G. 2, c. 4 (*Ir.*), which enables a *landlord* or *lessor* to eject for non-payment of rent, even where no condition of re-entry exists at law, if one year's rent or more is in arrear, and the lands are held by "*lease, minute or contract in writing*;" and by the 25 G. 2, c. 13 (*Ir.*), where the lands have been or shall be enjoyed "under any article, minute or contract in writing," even though it does not contain an actual demise or clause of re-entry, if one year's rent or more is in arrear. Now in the present case the yearly tenancy was regulated by the lease, the term granted by which had determined at law; and, therefore, under these two last statutes this ejectment is maintainable. The other side may rely on the recital in the 5 G. 2, c. 4 (*Ir.*), s. 3, as showing that the leases under the previous Acts must have been in writing, because counterparts are there mentioned; but that is a mis-recital of the effect of the previous Acts, and therefore not conclusive: *Regina v. Haughton* (a). In *Thomas v. Packer* (b), the ejectment must have been under the English Common Law Procedure Act, 15 and 16 Vic., c. 76, s. 210 (c), although it is not so expressly stated in the report of the case, because it is stated that "more than half a year's rent was due, and no sufficient distress was found upon the premises." In order to eject, under that statute, a right of re-entry must exist; and in *Thomas v. Packer* it was held that the condition of re-entry in the expired lease formed part of the yearly tenancy, which arose by the tenant overholding and paying rent, and, therefore, that the ejectment was well brought. That case must rule the present one, for the English statute is framed in even more stringent terms than the Irish statutes; and, although it begins by referring to all cases between *landlord and tenant*, it proceeds to speak of *landlord* or *lessor*, *lessee* and *lease*. That was the case of a lease which had expired by effluxion of time; the lease in the present case was determined only by the wrongful act of the plaintiff's lessor. The case in *Nap. Dig.*, p. 149, cited in

(a) 1 El. & Bl. 501; S. C., 17 Jur. 455; 22 L. J., M. C., 89.

(b) *Supra*.

(c) See Cole on Eject. 415, 416.

2 *Fur. L. & T.*, p. 1140, is nowhere reported, and cannot be considered an authority. In *Jack d. Thompson v. Home* (a), and *Lessee of Warren v. Martin* (b), the Judges expressly avoided deciding this question. The word *lease* is not exclusively applied to an instrument in writing: *Timmins v. Rowlinson* (c). In the first section of the Statute of Frauds, it is used by the Legislature in reference to a parol letting; and although the remedy of ejectment for non-payment of rent on a "*parol demise*" is expressly given in the Civil-bill Court, by the 14 & 15 *Vic.*, c. 57, s. 73, yet it was held that the same remedy existed under the former Civil-bill Act, 6 & 7 *W.* 4, c. 75, s. 2, in which the words used are "lands, "tenements or hereditaments, held under any grant, lease or other "instrument:" *Charters v. Gilroy* (d); *Young v. McNally* (e); ——— *v. Young* (f). Lastly, on the form of the exceptions, the plaintiffs are entitled to keep the verdict.

M. T. 1858.
Queen's Bench.

FOOT
v.
WARREN.

B. Sullivan, in reply.

The exceptions are correctly taken. Then, as to the second point made on the other side; if the declaration in covenant in 1852 is to be conclusive evidence, J. Warren must be taken to have been assignee of the lease of 1782; and if so, the ejectment in 1850 was duly served, and the present plaintiffs have no title upon which to recover in the present action. As to the point of enlargement, 4 *Bac. Abr.*, tit., *Leases* 9, s. 2. The statute 5 *G.* 2, c. 4 (*Ir.*), s. 4, applies only where a subsisting interest is surrendered, for the purpose of a renewal: *Lessee Clanmorris v. Bourke* (g).—[LEFROY, C. J. We wish you to confine your reply to the point whether this ejectment is maintainable under the Ejectment Statutes?—The tenancy upon which this ejectment is brought is not under any writing within the Ejectment Statutes. Putting the case most favourably for the plaintiffs, the tenancy of the defendants

(a) 1 *Jebb & Sy.* 424; S. C., 1 *Ir. Law Rep.* 179.

(b) 2 *Jebb & Sy.* 424; S. C., 3 *Ir. Law Rep.* 79.

(c) 3 *Barr.* 1603.

(d) 1 *Cr. & D.*, C. C., 454.

(e) 2 *C. & D.*, C. C., 34.

(f) *Ir. Cir. Rep.* 59.

(g) 13 *Ir. Law Rep.* 305.

M. T. 1858. *Queen's Bench.* arises by the payment of rent since the fall, in 1837, of the last life in the renewal of 1794. When a lease expires, or is determined at law, if the tenant holds over and pays rent as before, and such rent is accepted, a new tenancy is thereby created; but the contract rests only in parol, although the law imports into the new contract the same terms and conditions as were contained in the lease, as far as they are applicable to the yearly tenancy, which tenancy is thus held *on the terms of*, and not *under*, the expired lease. Such a tenancy is a conclusion of law, arising from the payment of rent, and not a continuance of the lease: *Finch v. Miller* (a); *Hyatt v. Griffiths* (b). If the yearly tenancy were *under* the lease, covenant would be the form of action to recover the rent; but that is not so: *assumpsit*, which does not lie on an instrument under seal, is the proper form of action in such case: *Digby v. Atkinson* (c). This point is concluded by authority. The 1 G. 4, c. 87, requires that, in ejectment, a tenant in possession, holding under a lease or agreement in writing, which has expired or been determined by notice to quit, shall enter into a recognizance to pay the costs and damages; and both in England and Ireland it has been held that a yearly tenancy, created by holding over and paying rent, after the expiration of a lease, is a tenancy by parol, and not within the statute: *Doe d. Thomas v. Field* (d); *Loveland d. Roberts v. Thurstout* (e). In the latter case, Smith, B., says:—"The landlord, after the expiration of the lease, has his election "to treat the former tenant either as a tenant or a trespasser. If "he treat him as a tenant, then they stand under that relation upon "the substituted contract, which is not a contract of the nature "of those to which the Act applies" (f). The covenant for perpetual renewal in a lease, the lives in which have dropped, is not sufficient to maintain ejectment for non-payment of rent: *Shenton v. Corbally* (g). Ejectment for non-payment of rent cannot be maintained on a yearly tenancy not created by writing. The sole

(a) 5 C. B. 428.

(b) 17 Q. B. 505.

(c) 4 Camp. 275, 278.

(d) 2 Dowl. 542.

(e) 1 H. & B. 354 n.

(f) p. 356, n.

(g) 1 Hog. 403.

contention in *Lessee of Warner v. Martin* (a) was whether, if the yearly tenancy were created by writing, the ejectment would lie; it was conceded at the Bar that if there were no writing the action could not be maintained; and that is the opinion of the Profession: *Furl. L. & T.*, p. 1139, ss. 68, 69; *Nap. Dig.*, p. 149; *Shenton v. Corbally* (b). Express provision has been made for such ejectment, in cases within the Civil-bill jurisdiction, by the 14 & 15 *Vic.*, c. 57, s. 73, where a tenant holds under "lease, &c., in writing, or by parol demise, or under a tenancy from year to year;" but there is no such provision in the Ejectment Statutes. Next, upon the construction of the Ejectment Statutes, it is clear that this action cannot be maintained, unless there be a writing. There is but one statute in England, the Common Law Procedure Act (15 & 16 *Vic.*, c. 76); in Ireland there are seven statutes. It is therefore impossible to argue this case on the English Act; and, even if *Thomas v. Packer* (c) were decided under that Act, which is not clear, that decision cannot govern the present case. The 8 *G.* 1, c. 2 (*Ir.*), which was passed "to explain and amend" the 11 *Anne* and the 4 *G.* 1, c. 5 (*Ir.*), enacts (section 1) that if one year's rent is due "to any landlord or lessor," he may eject for non-payment of the rent. The other side say that the statute distinguishes between *landlord* and *lessor*; but it provides that if defence is taken, the plaintiff shall prove at the trial "*the counterpart of the lease by which such rent is reserved, and that such landlord or lessor, or those under whom he derives,*" have been in possession for three years. The Legislature here interpret *landlord or lessor* to be a person who has granted a lease, reserving the rent which is so in arrear, and of which lease there is a counterpart. Then the 5 *G.* 2, c. 4, which was passed "*for further explaining and amending*" the previous statutes, provides (section 3) for cases where "*the counterpart of the lease by which such rent is reserved*" cannot be produced, and enables the plaintiff to rely on "*the original lease, minute or contract, or a copy thereof, or a copy of such counterpart.*" All the Ejectment Statutes are to be construed as one

M. T. 1858.
Queen's Bench.
FOOT
v.
WARREN.

(a) 2 Jebb & Sy. 424; S. C., 3 Ir. Law Rep. 79.

(b) *Supra.*

(c) *Supra.*

M. T. 1858.
Queen's Bench
 FOOT
 v.
 WARREN.

code, being *in pari materia* : *Lessee of Black v. Davis* (a); and in them all *lease* means a letting by writing, and *landlord* or *lessor* the person entitled to the reversion on such lease.

LEFROY, C. J.

The whole of this case comes to the last point. The argument which was addressed to us upon the doctrine of enlargement has been disposed of by the Court during the progress of the argument; and the only remaining point upon which there can be any reasonable doubt or hesitation is the last point, namely, what is the effect of the new relation existing between the parties? This, it is now clear, has resulted only in an implied tenancy from year to year; and we are all perfectly satisfied that, upon such a tenancy as that, an ejectment for non-payment of rent cannot be maintained. It is quite impossible for me to add anything to the argument which has been addressed to us by Mr. *Sullivan* upon that point. It is manifest, upon the terms of the statutes themselves, that the present ejectment cannot be maintained. I can only add that I fully concur in Mr. *Sullivan's* observations upon the Ejectment Statutes.

PERRIN, J., concurred.

O'BRIEN, J.

Mr. *Sullivan's* argument has removed the doubt which I entertained as to the effect of the payment of rent for such a series of years under the lease of 1782; his argument has also disposed of the case of *Thomas v. Pacher*. The Irish Ejectment Statutes contain in their very terms a legislative declaration that ejectment for non-payment of rent cannot be maintained against a tenant holding from year to year by parol. There is a clear distinction between holding *under* and holding *on the terms of* an expired lease; the latter is not holding under a writing, within the meaning of the Ejectment Statutes.

Exceptions allowed, and *venire de novo* awarded.

(a) Batty, 80.

E. T. 1859.
T. T. 1859.
Exch. Cham.

Cyrcbequer Chamber.

A suggestion of error in the above record and proceedings, alleged by the plaintiffs, and denied by the defendants, having been duly entered (*a*), the cause now came on to be heard before the Court of Error.*

April 30.
May 2, 3, 28.

Chatterton and Jellett, for the plaintiffs.

Serjeant *Deasy* and *H. J. Leslie* (with them *B. Sullivan*), for the defendants.

Serjeant *Deasy* replied.

Cur. ad. vult.

FITZGERALD, B.

This was a statutable ejectment for non-payment of rent, tried before Mr. Baron GREENE, at the Cork Assizes of Spring 1858. There was a verdict for the plaintiff, under the direction of the learned Judge. A bill of exceptions was taken to that direction by the defendant O'Callaghan; and the case comes before this Court on that bill of exceptions, and the judgment of the Court of Queen's Bench, in which the record was, allowing the exceptions and awarding a *venire de novo*. By the plaint, Foot and another plaintiff, since deceased, complained that certain defendants therein named held that part of the lands of Gegannah formerly in the possession of one William Withers, as tenants to the plaintiffs, by lease, at the yearly rent of £184. 12s. 4d.; and that the rent for eight years, ending in March 1857, was due to the plaintiffs, who thereupon claimed possession of the lands. Defence was taken by O'Callaghan and others, to the effect that the lands mentioned in the plaint were

May 28.

(*a*) Com. Law Proc. Act 1853, ss. 173-176.

* *Coram* MONAHAN, C. J., FIGOT, C. B., KEOGH and CHRISTIAN, JJ., RICHARDS, GREENE and FITZGERALD, BB.

T. T. 1859. *Exch. Cham.*
 FOOT
 v.
 WARREN.

not, at the time of the issuing of the summons and plaint, or since, held of the plaintiffs by the defendants, or any other persons or person, as tenants or tenant to the plaintiffs, as in the plaint alleged. The material issue settled between the parties was, whether the lands in the plaint mentioned were, at the time of issuing the plaint, or since, held of the plaintiffs by the defendants, or any of them, or any persons or person, as tenants or tenant of the plaintiffs?

The facts proved at the trial, and appearing on the bill of exceptions, so far as they seem material, are these:—On the 26th of November 1761, one O'Callaghan, having a sufficient estate in the lands of Gegannah, which is still subsisting, and proved or assumed to be now vested in the defendant O'Callaghan, made a lease of those lands, including the premises in question, to one Nash, for a term of years, dependent on two lives, with covenant for perpetual renewal. On the 7th of November 1769, that lease being still subsisting, Nash, the lessee, sub-demised the premises in question to William Withers, named in the plaint, for 993 years. At law, the estate granted by that sub-lease was of course dependent for its continuance on the continuance of the estate granted to Nash by the lease of 1761. Any interest which may be subsisting under the lease of 1769, or any legal estate subsisting by reason of an overholding after its termination, and payment of a rent of the same amount as that mentioned in it, is proved to be vested in the plaintiff.

On the 30th of July 1782, Withers, the lessee in this sub-lease of 1769, sub-demised the lands in question to one Atkins, for 950 years, at the yearly rent of £200, of the late currency of Ireland, being equivalent to £184. 12s. 4d. That lease of 1782 was at law dependent for its continuance on the continuance of the lease of 1769, which itself depended for its continuance on the continuance of the lease of 1761; and that lease of 1782, or a tenancy regulated by its terms, and created by overholding after its termination, and payment of the rent mentioned in it, is the tenancy which the plaintiff seeks by the present ejectment to evict.

At some time between 1782 and 1794, the last liver of the *cestui que vies* in the lease of 1761 died. Of course, the legal term granted by the lease of 1761 thereupon determined, and, together with it,

the dependent terms created by the leases of 1769 and 1782, also determined. Possession, however, it would seem, continued according to the rights as they would have been if all those terms were still subsisting; and, on the 21st of March 1794, the then chief landlord, deriving from the lessor in the lease of 1761, made a new lease to Nash of the lands of Gegannah, for a term dependent on two new lives, and which new lease purports, as I understand it, to be made in pursuance of the covenant for renewal.

One contention of the plaintiff is, that this new lease operated as a renewal, under the statute 5 *G.* 2, c. 4, and, so operating, gave effect and continuance to the sub-interests of 1769 and 1782, during the continuance of the new term granted by that renewal of 1794. This is disputed, on the ground that the new lease of 1794 was not granted until after the expiration, by effluxion of time, of the lease of 1761, and that the statute of *G.* 2 does not apply to such a case. The question thus raised seems to me an important one; but I do not think that its decision is at all necessary in this case; and I wish to be understood as expressing no opinion upon it. For the purpose of the argument, and for that only, I shall assume that the plaintiff is right in this contention, and that the new lease of 1794 had, under the statute of *G.* 2, the effect which he alleges.

Some time before the year 1837, the defendant O'Callaghan, then having the estate of the lessor in the leases of 1761 and 1794, purchased all Nash's interest under those leases; and it was conveyed to him. Afterwards, and in the year 1837, the last liver of the *cestui que vies* in the lease of 1794 died. Thereupon the legal estate under the lease of 1794, if subsisting out of the landlord, would unquestionably have determined, and with it all the legal terms in the dependent sub-leases of 1769 and 1782. But it is proved that, up to the year 1849, the occupier of the lands in question paid, on behalf of the plaintiff, or those from whom the plaintiff derives, to O'Callaghan, as representing Nash's interest, the rent, or a rent equal in amount to the rent reserved by the lease of 1769, and to the plaintiff, or those from whom the plaintiff derives, the difference between that rent and the rent reserved by the lease of 1782. This made, at all events, a tenancy from year to year

T. T. 1859.

*Erch. Cham.*FOOT
v.

WARREN.

T. T. 1859. between O'Callaghan and the plaintiff, regulated, as is contended,
Esch. Cham. and as I think, by the terms of the lease of 1769; and a tenancy
 FOOT from year to year between the plaintiff and the occupier, regulated
 S. by the terms of the lease of 1782.
 WARREN.

It further appears that, in the year 1850, O'Callaghan brought an ejectment for non-payment of rent on the tenancy subsisting under, or regulated by, the lease of 1769, obtained judgment, executed his *habere*, and went into possession. The judgment in this ejectment does not conclude the plaintiff here, because he was not served with the summons in ejectment. Subsequently to the ejectment, O'Callaghan brought an action of covenant on the covenant for payment of rent contained in the lease of 1769, but he brought it against a person who would not have been assignee of that lease if subsisting, and failed. Subsequently also to O'Callaghan's ejectment, the plaintiff here brought an ejectment on the title for the recovery of the lands in question, and failed. It was on these facts that the Judge, at the trial, directed a verdict for the plaintiff.

A bill of exceptions was, as already stated, taken to that direction by the defendant O'Callaghan; and, on the argument of that bill of exceptions, the Court of Queen's Bench allowed the exceptions, and awarded a *venire de novo*. The correctness of that decision is now to be considered; and the question to be determined is, whether, at the time of bringing the present ejectment, there was subsisting in the lands in question a tenancy to the plaintiff, on which the statutable ejectment for non-payment of rent can be maintained?

The defendant contends that, if any tenancy at all was subsisting under the plaintiff, it was a tenancy from year to year only, and that ejectment for non-payment of rent under the statute does not lie in respect of such a tenancy.

The plaintiff contends, first, that even supposing the tenancy subsisting under him was a mere tenancy from year to year only, still the statutable ejectment for non-payment of rent would lie. He says that, by the earliest Ejectment Statute, 11 Anne, c. 2, the only requisites to maintain such an ejectment are the relation of landlord and tenant, a right of re-entry in the landlord for non-payment of rent, there being a half year's rent due, and no sufficient

distress on the lands to countervail the rent so due. He says that, even supposing the tenancy subsisting under him was a mere tenancy from year to year only, all these, the only requisites, are shown in the present case, except the want of a sufficient distress; and he says that, by the subsequent statute, 4 G. 1, c. 5, the necessity of showing that requisite is dispensed with in all cases within the statute of *Asses*, in which a full year's rent is shown to be due, which is shown in the present case. He says that the only other requisite of which a doubt could be entertained, in the case of a mere tenancy from year to year, is a right of re-entry for non-payment of rent. But he says that the late case of *Thomas v. Packer* decides that, when a tenancy from year to year arises from overholding on the expiration of a lease containing a clause of entry for non-payment of rent, accompanied by a payment of rent the same as that reserved in the expired lease, the right of entry for non-payment of rent is by law annexed to the tenancy from year to year, so created; and he says that the tenancy from year to year (if it be no more), here subsisting, is one so regulated by the terms of the lease of 1782, which did contain a clause of entry for non-payment of rent. But he further says that it is not necessary for him to go so far even as this, because the statute 4 G. 1, c. 5, as explained by a subsequent statute, 5 G. 1, c. 4, does in all cases, in which a year's rent is due, dispense with the requisite of a right of entry for non-payment of rent, as well as with that of the want of a sufficient distress. He contends that there is nothing in any of these statutes rendering it necessary that the tenancies to which they apply should be created by writing, or should be for any particular term, and that they do apply to all tenancies, whether created by writing or not, except so far as the Statute of Frauds renders writing necessary, which is not the case as regards a tenancy from year to year.

I confess that if this question were wholly *res nova*, there is much in this argument to which I should find it difficult to give an answer satisfactory to my own mind. Much that was said in answer on the part of the defendant does not satisfy me, considered by itself, and tested by logical rules only. But, so far as my own

T. T. 1859.
Esch. Cham.

FOOT
v.

WARREN.

T. T. 1859.
Exch. Cham.

FOOT
 v.
 WARREN.

experience goes, so far as I have been able to obtain information from the experience of others, so far as the *dicta* of eminent Judges and the statements of text-writers enable me to collect the universal opinion of the Profession, I entertain no doubt that the uniform construction given to the statutable code of ejectment in Ireland has been, that the statutable ejectment for non-payment of rent does not lie on tenancies created by a parol demise from year to year, express or implied.

Though, as I have said, the arguments of the defendant, as arguments founded on the construction of the statutes merely, are not fully satisfactory to my mind, yet, taking them in connection with this universal opinion of the Profession, I cannot but see that the language of the statutes relied on appears to assume and to be accommodated to that opinion; and, that being so, I, for one, cannot, even in the absence of direct authority, venture to decide that the construction put universally in practice on the statutes is a wrong one. The very latest of these statutes actually gives to the Civil-bill Courts, already having under the previous statutes a jurisdiction which, if the plaintiff's position be well founded, would comprise tenancies from year to year, actually, I say, gives to those Courts, and apparently to them only, the right of applying the statutable remedy to tenancies from year to year, in express terms.

It seems to me that, under these circumstances, the universal construction, in practice, of the statutes must be considered by us at least as having almost become a part of the contract between landlord and tenant, with which it would be unwarrantable on our part at this day to interfere.

I cannot, therefore, acquiesce in the plaintiff's contention on this head. But, secondly, it is said, assuming (as I do assume, but for the purpose of argument only) that the lease of 1794 was a renewal of that of 1761, operating under the 5 G. 2, and thus giving renewed vitality to the sub-interests of 1769 and 1782, then the lease of 1794 could not determine by effluxion of time before the year 1837. But, before that time came, the chief landlord, who was bound by covenant to renew the leases of 1761 and 1794, had acquired all the legal and equitable estate given by those leases.

Now it is said that the *habendum* in those leases is so framed as to make the estates thereby granted capable of enlargement. The *habendum*, as I understand it, is for the term granted by the lease, and for further terms to be added pursuant to the covenant for renewal. If then, it is said, the interest in the lease of 1794 had continued in Nash, and he, before the determination of that lease, had complied with the exigencies of the covenant for renewal on his part, the lease of 1794 would have itself operated to enlarge the estate thereby granted for a further term. And then, it is said, when the lease of 1794 became vested in the chief landlord, it must be presumed that all the duties to himself were performed, and that the estate under the lease of 1794 in him was consequently enlarged, and, with that enlargement, continuance was given to the sub-interests of 1769 and 1782, which, therefore, are still subsisting.

T. T. 1859.

Exch. | *Cham.*

FOOT

v.

WARREN.

I confess I do not concur in this argument, even on the supposition that the lease of 1794 had continued in Nash, and that he had complied with the requisites on his part to be performed in the covenant for renewal. I, for one, have never been able to understand the application of the doctrine of enlargement of estates as I have seen and heard it applied to the *habendum* in leases renewable.

But it is not necessary to discuss this, because the effect of the transaction between Nash and O'Callaghan, so far as we can see it, was not, at law, to give O'Callaghan a subsisting estate under the lease of 1794, but to merge that estate in his superior interest. The transaction did not, of course, before the regular period for the determination of the lease of 1794, destroy the sub-interests, but it vested in O'Callaghan no legal term capable of enlargement, whatever his equitable liabilities to the undertenants, arising from it, may have been.

I cannot, therefore, yield to this, the second contention of the plaintiff. But, thirdly, it is said that the terms purporting to be granted by the leases of 1769 and 1782 have not expired by effluxion of time, according to the words or language of those instruments. It may be true, it is said, that the determination of the estate granted by the leases of 1761 and 1794, out of which they were derived, did put an end to them, as against the chief landlord.

T. T. 1859.
Erch. Cham.

FOOT
v.

WARREN.

But, if that be so, he has not taken advantage of it; the possession has, without effectual disturbance by him, continued regulated by them; and, that being so, however *he* might by adverse proceeding evict the possession so regulated, no party having a possession regulated by them, and originally derived from them, can, while such a possession is undisturbed, avail himself of this, the chief landlord's right.

Now this contention assumes that the ordinary recognised rule, by which the estoppel arising from a lease is limited, does not apply to a case of the kind suggested. That recognised limitation is this; though a tenant cannot dispute his landlord's title to grant a lease under which he has taken possession, he may show that the landlord's interest has determined after the lease was made.

Now it is sufficient to say that this recognised limitation must be held to apply to the case supposed, unless some authority be shown that such case is an exception. None such is shown. *Sparks' case* was referred to, but it is no authority for the purpose. That was the case of a mere tenant at will making a lease for a term; the making of the lease was a determination of the tenancy at will, and the term, therefore, was a grant by one having no estate, or only the estate acquired by disseisin from his tortious act; and in either case the term would be a good one as against the termor; in the one case by pure estoppel, in the other as taking effect out of a fee, though a tortious one.

But then it is said, though this might be so in the case of an ejectment founded on a forfeiture at Common Law, it is not so in the case of the Irish statutable ejectment for non-payment of rent. The Irish statutable code, it is said, limits the tenant's right to show the determination of an estoppel in all cases where the counterpart of his lease is produced, and a triennial possession on the part of the landlord is shown.

This alleged effect of the statutes I shall consider together with the fourth contention on the part of the plaintiff, which is this:—Fourth, the plaintiff says that, by the Ejectment Statutes, and especially the 25 G. 2, c. 13, the remedy of ejectment for non-payment of rent is given in every case where there exists a tenancy,

though at law, from year to year, only regulated as to its terms by some instrument in writing, ascertaining the rent. That, in the present case, a tenancy from year to year, under the plaintiff, is shown to be subsisting, and which is regulated as to its terms by the expired lease of 1782, which is an instrument in writing ascertaining the rent; and that, consequently, ejectment for non-payment of rent is maintainable in respect of this tenancy.

It is obvious that this view of the statutes, as well as that which I reserved for consideration together with it, rests on some supposed qualification, created by the Acts, of the tenant's privilege to show the estoppel, created by the instrument under which he holds, determined. It is certain that this supposed qualification would not have existed in the case of an ejectment at Common Law for forfeiture by non-payment of rent; and we are now to see of what defences, and of what alone, the Ejectment Statutes deprive the tenant.

The only privilege, so far as the trial and recovery in ejectment are concerned, given by the statute of *Anne* to the landlord, is a dispensation with the necessity of proving a formal demand and entry. Subject to that, by the express words of the statute, the lessor or lessors in ejectment shall recover judgment and execution *in the same manner* as if the rent in arrear had been legally demanded and a re-entry made. With that limitation, the ejectment is to be tried in the same manner as it would theretofore have been tried, and the defendant is entitled to all the defences which he could have had at Common Law, and in the same manner.

After the trial and recovery, no doubt, the statute does give to the judgment and execution a conclusive effect which the Common Law judgment and execution would not have had. But this is not to the purpose, further than showing that it gives a strong reason for not taking from the tenant, prior to the judgment and execution, any privilege which he before had, and which is not expressly taken from him by the statute.

The next statute, 4 *G.* 1, c. 5, does nothing more material to the present question than dispense with one of the requisites of the landlord's case, under the statute of *Anne*, viz., proving the want of a distress; and it does dispense with that requisite in all cases

T. T. 1859.
Essex. Cham.

FOOT
v.
WARREN.

T. T. 1859. where a year's rent is due; but it deprives the tenant of no other
Erech. Cham. privileges.

FOOT
 v.
 WARREN.

The statute 8 G. 1, c. 2, was directed principally against the mischief that defences were taken to the landlord's ejectment in the name of strangers, that is, of persons not deriving under the tenant. It is certain that, in every ejectment at Common Law, *founded on a right of entry for non-payment of rent*, the landlord, as part of his case, must have proved that the defendant derived under his tenant, otherwise, in such an ejectment he showed no right of entry against him: and as the previous statutes had, subject to the dispensation of showing a formal demand and entry, left the landlord, as to the trial of his ejectment, in the same position as he was at Common Law, it was still necessary that he should show, as he must to this day in England, either his full title, or that the defendant derived under his tenant. When defence was taken in the name of a stranger, this latter alternative was impossible.

Again, a landlord could not, by serving notice on a defendant, whom he did not show to derive from his tenant, to produce the original lease, entitle himself to give secondary evidence of the lease and the counterpart, was, I think, for a considerable time conceded only as secondary evidence. To remedy this mischief, the statute now under consideration enacts that, if the landlord produce the counterpart of the lease, and prove a possession for three years before the ejectment, and have served on the tenants, together with the ejectment, a notice that it was brought for non-payment of rent, he shall be enabled to recover under the previous statutes; that is, he should be entitled to recover without proving that the defendant derived under the lease; and it is the service of this notice that makes, in this country, the ejectment for non-payment of rent a specific action, in which the landlord can only recover on a title as landlord. But how is it that he is to recover? Why in such manner and under such provisions as by the former Acts is declared and appointed. Further then, than by dispensing with the necessity of showing the derivation of the defendant's title, under his tenant, in cases where the counterpart

of a lease is proved, and triennial possession shown, no defence or privilege is taken from the defendant, which he had before the statute.

T. T. 1859.
Exch. Cham.

FOOT
v.

WARREN.

The next statute, 5 *G. 2*, c. 4, enables the landlord to recover in cases where the tenancy is created by leases, minutes and contracts in writing, containing an actual demise, though not containing any clause of entry for non-payment of rent; but he is to recover in such and the same manner, to all intents and purposes, as if a clause of re-entry had been expressly contained and specified in such lease, minute or contract in writing, *and not otherwise*. This statute, when there was an actual demise in writing, dispensed with the right of entry for non-payment of rent; but did so, by putting the landlord in the same position, and no other, as if he had such right. It, therefore, deprives the tenant of no privilege of defence, which the tenant would have before had, in cases where there was a lease giving a right of entry.

The last statute is the 25 *G. 2*, c. 13; and it extends the remedy to cases where there is an article, minute or contract in writing, made of any lands, ascertaining the rent, and where the lands have been enjoyed under the same. But, what the statute does is to give the landlord the right to recover in the same manner, to all intents and purposes, as if such article, minute or contract in writing contained an actual demise, and as if a clause of entry had been expressly specified therein, *and not otherwise*. It puts the landlord in as beneficial position as if the instrument were an actual lease containing a clause of re-entry for non-payment of rent, but no other. Therefore, every defence open to the tenant upon an actual lease, with clause of entry, is open to him still, notwithstanding the statute.

If, therefore, the expired lease of 1782 could be held as a contract within the statute 25 *G. 2*, c. 13, ascertaining the rent, the tenant is entitled to the same defence as if it were sued on as a subsisting lease, and may show the interest of the lessor, at the time of its making, since determined. I cannot, therefore, acquiesce in any of the contentions of the plaintiff, and am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

T. T. 1859.

Each. Cham.

FOOT

v.

WARREN.

CHRISTIAN, J.

In this case I have arrived at the same conclusion as my Brother FITZGERALD; and I have listened with great attention to his judgment, to see whether there was any substantial difference between us as to the grounds of that conclusion, which would render it necessary for me to state my reasons in detail. There is, however, scarcely any difference between us; and I shall therefore content myself with indicating, rather than stating at length, the views which strike my mind upon the several points in the case. The facts have been fully and accurately stated by my Brother FITZGERALD; and the question is whether, at the close of the case on both sides, at the trial, the plaintiffs were entitled to the direction which they obtained from the learned Judge, as having established the affirmative of the issue which the jury had to try, namely, "Whether the lands in the plaint mentioned were, at the time of issuing the plaint, or at any time since, held of the plaintiffs, or either of them, by the defendants, or any other person or persons, as tenants or tenant to the plaintiffs, or either of them?" Now, upon that issue, I may observe, with reference to what was urged in the argument, founded on the generality of its language, that it must be read, in my opinion, with this qualification implied, viz., was the tenancy one, upon such terms and conditions, as that ejectment for non-payment of rent could be maintained upon it, under the Ejectment Statutes? The issue is in the form which is usual under the Common Law Procedure Act; but it was not intended by that Act to alter the *law* as to ejectment for non-payment of rent; and it was therefore competent to the defendants to show, if they could, that the lands were not *so held* as to entitle the plaintiffs to succeed in the ejectment, notwithstanding that it were proved that the lands *were* held by the defendants, as tenants to the plaintiffs.

The plaintiffs having established a *prima facie* case, by proof of the lease of 1782, and deduction of their title, under the lessor in that lease, the defendant encountered it by showing that this lease was carved out of a term which itself was derived out of a lease for lives, which lives had all expired, and alleging that, consequently, the derivative terms also had come to an end. To this the plaintiff

replies, by disputing both the premises and conclusion of the defend- T. T. 1859.
 ants; and, as I understand the case of the plaintiffs, what they say is *Exch. Cham.*
 this:—first, that the lease of 1782 has not expired, but, in fact, FOOT
 still exists; and secondly, that even if it has expired, yet the tenancy v.
 continued to be regulated by the terms of it (by which I understand WARREN.
 to be meant that, for the purposes of this ejectment, the case is
 to be dealt with precisely as if it were, in fact, still subsisting);
 and, thirdly, that, even if the determination of the lease must be
 conceded, and the case dealt with simply as a tenancy from year to
 year, nevertheless, ejectment for non-payment of rent is maintain-
 able; and upon either of two grounds, viz., first, because the
 expired lease of 1782 is an article, minute or contract in writing,
 within the meaning of the 25 G. 2, c. 13; and secondly, because, at
 all events, a parol yearly tenancy has been created by receipt of rent,
 having incorporated in it the proviso for re-entry contained in that
 lease, and that, in this latter alternative, the case is within the
 authority of *Thomas v. Packer*.

Now, with respect to the first of these contentions, namely,
 the actual subsistence, to the present time, of the term granted by
 the lease of 1782, there is no difference of opinion amongst the
 Members of the Court. None of us, I believe at any time, enter-
 tained a doubt that the argument for the continuance of the leases of
 1769 and 1782, founded on an attempted application of the doctrine
 of enlargement of estates, could not be sustained. There may,
 perhaps, be some difference as to the mode in which that conclusion
 is arrived at. Some of the Members of the Court may think that
 the 5 G. 2, c. 4, s. 4, does not apply to this case, because all the
 lives in the head lease had dropped, before the renewal of that
 lease in 1794; whilst others may be of opinion that, even conceding
 that that statute did apply, yet it would not help the plaintiffs'
 argument further, at the utmost, than by, perhaps, showing a post-
 ponement of the determination of the leases of 1769 and 1782, until
 the year 1837, when the last survivor of the *cestui que vies* named
 in the renewal of 1794 died. I prefer dealing with the case as my
 Brother FITZGERALD has done, and shall abstain from expressing
 any opinion as to whether the 5 G. 2, c. 4, does or does not apply

T. T. 1859.
Ezek. Cham.

FOOT
v.

WARREN.

to a case where, at the time when the renewal is executed, all the lives in the original lease have fallen. But conceding, for the sake of argument, that the head lease, and therefore the derivative leases, were prolonged until 1837, what I am entirely at a loss to discover is any principle upon which, in a Court of Law, it could be held that the legal terms lasted beyond the death of the last survivor of the lives in the renewal. It is said that, before O'Callaghan acquired the interest of Nash (the lessee in the lease of 1761, and lessor in that of 1769), there was existing a possibility of enlargement of Nash's interest, by a renewal of the lease of 1761, which enlargement, if called into operation, would, it is said, have enured to the benefit of the leases of 1769 and 1782, and that, as O'Callaghan was the person who was bound to renew the lease of 1761, his acquisition of the estate of Nash should be considered as tantamount, in effect, to the execution of a renewal, and therefore to an enlargement of all the leases. But whatever rights this double character of O'Callaghan might give to the lessees in a Court of Equity, I am clearly of opinion that the argument sought to be founded upon it, in this Court, cannot be sustained. So far from O'Callaghan's purchase of Nash's interest enuring as an enlargement of that interest, it operated as a merger of it, and the possibility of enlargement became thenceforth an impossibility, if indeed it ever had any existence, in the eye of a Court of Law, at all. I am, therefore, of opinion that the defendants have shown that the term granted by the lease of 1782 had determined previously to the bringing of this ejectment.

I come then to the second point which was urged for the plaintiffs, and which, in substance, resolves itself into this: that even if they fail to show that the legal term has been prolonged in the way contended for, the case is nevertheless to be dealt with, for the purposes of this ejectment, exactly as if they had succeeded, in other words, as if the lease of 1782 were still in existence.

This proposition was rested chiefly upon the passage which was referred to from *Furl. L. & T.*, p. 1142, s. 73, and for which Mr. *Furlong* cites *Sparks' case*. Now, although it is impossible to speak with too great respect of that most excellent text-book, yet I

am bound to say that I cannot see my way to concur in the proposition there laid down. It is not supported by the authority referred to, and it seems to me to be a misapplication of the Ejectment Code. The object of the Ejectment Statutes was to facilitate the assertion of right of re-entry for non-payment of rent in cases in which such right existed at Common Law, and not (except in two instances, which I shall presently mention) to give a right of re-entry and ejectment in cases in which no such right existed before. Of the five statutes which were dwelt upon in the argument, the first three merely facilitate procedure and proof. The last two *give rights* where none existed before, viz., first, where there is an actual demise, but no clause of re-entry for non-payment of rent; secondly, where there is neither actual demise nor clause of re-entry, but there is an article, minute or contract in writing, ascertaining the rent. But a case like the present, that is to say, a case where there is a formal instrument of actual demise, and with an express clause of re-entry, but both demise and clause of re-entry are gone, by failure of the original title, such a case is not within any of those statutes—not within the two latter, *ex vi terminorum*—not within the three former, because the right founded on the lease is gone, and they, as I have said, give no new rights. If, indeed, it could be shown that the defendants are estopped from showing the determination of the title of the lessor of 1782, the case would be different. But is that so? It is familiar to us all that, although a tenant cannot allege that his lessor had no title, he may allege and prove that his title has determined. This might clearly have been done in an action of covenant for rent upon the lease of 1782, and I am unable to see why it may not equally be done in an ejectment for non-payment of rent, to the maintenance of which the subsistence of a legal rent, recoverable by the ordinary remedies, is quite as essential as it is in an action of covenant. *Sparks' case* is, as shown by my Brother FITZGERALD, no authority whatever against this. I may further observe, that, even if the doctrine sought to be rested upon the passage in Mr. *Furlong's* work could at all be supported, it would be only as against *the tenant* under the lease that it would apply. But O'Callaghan is here in a very peculiar position. He is the

T. T. 1859.

Esch. Cham.

FOOT

v.

WARREN.

T. T. 1859.
Exch. Chanc.

FOOT
 v.
 WARREN.

head landlord, the person who was entitled to enter, upon the determination of the lease of 1761. It is true he cannot now do that, because he has received rent, and thereby created a tenancy from year to year against himself, upon which (until determined) an ejectment on the title could be maintained against him. But it is quite a different thing to say that he is under any estoppel against showing the fact that the lease of 1761, and, therefore, that of 1782, has come to an end. I am of opinion that he is not; that consequently the plaintiffs' second proposition cannot be sustained, and that the true condition of the case is simply that of a tenancy from year to year, created by receipt of rent, after expiration of a lease.

But the plaintiffs insist that, even upon that assumption, the ejectment is maintainable. They say, in the first place, that the expired lease of 1782 is an article, minute or contract in writing, within the statute 25 G. 2, c. 13. Now the way to determine that is to turn to the statute and see what is the definition of the article, minute or contract with which it deals. Two things, I find, enter into that definition; first, that the instrument shall *not* contain an actual demise; secondly, that it shall be one "*under which*" the lands are held and enjoyed. I do not think that an expired lease answers either of those terms; not the former, because it *does* contain an actual demise; not the latter, because the lands are *not* held and enjoyed *under it*. They are held and enjoyed under a parol demise, implied from receipt of rent, and in which there is merely an adoption of some of the terms of the expired lease. The plaintiffs' case is not, therefore, in my opinion, aided by the statute 25 G. 2, c. 13.

If this be so, the case is reduced to its lowest condition, as regards its facts, that is to say, to that of a purely parol tenancy from year to year. But, even thus, the plaintiffs still insist that their ejectment is maintainable, and their contention they rest altogether upon the case of *Thomas v. Packer*. Now, with respect to that case, I will say, in the first place, that I am far from being satisfied that, even in England, it would be considered as deciding that, under such a tenancy, an ejectment is maintainable under

the English Ejectment Statute which corresponds with our 11 *Annæ*. The only question raised or argued in that case was, whether the condition of re-entry, in the expired lease, could be considered as incorporated into the new tenancy by parol? It was assumed that, if that were decided in the affirmative, the ejectment lay. Whether this was because the ejectment was one at Common Law, and not upon the statute, or whether, being upon the statute, the question of its applicability to a parol tenancy was overlooked or assumed, is not clear upon the report; suffice it to say, that that question was not argued or raised; and whatever may be the value of that decision in England, I am of opinion that, sitting here in the Exchequer Chamber, we are not bound by it. We have to deal here, not with one statute, as in England, but with a whole code of legislation which has, in the clearest manner, to my mind, put this construction upon the original Act 11 *Annæ*, and all its successors, that, to the maintenance of an ejectment for non-payment of rent, under these statutes, an instrument in writing, of some kind, is necessary; and such has been the settled opinion of the Legal Profession in this country. I, therefore, decline to follow, in this case, the decision in *Thomas v. Packer*, even if it be at all, which I doubt, an authority for the proposition which the plaintiff has contended for.

T. T. 1859.
Each. Cham.
 FOOT
 v.
 WARREN.

For these reasons, in addition to these stated by my Brother FITZGERALD, I am of opinion that the judgment of the Court of Queen's Bench should be affirmed.

KEOGH, J., concurred.

GREENE, B.

I am of the same opinion, and think that the judgment of the Court of Queen's Bench should be affirmed. My Brethren CHRISTIAN and FITZGERALD have so fully and clearly stated the facts of the case, and have so ably laid down the law as applicable to those facts, that little else remains for me than to express briefly my views upon the several points raised in the course of the discussion before us. The defence to the ejectment substantially is, that the defend-

T. T. 1859.
Esch. Cham.

FOOT
v.

WARREN.

ants did not hold under the plaintiffs in such manner as to authorise an ejectment for non-payment of rent, the tenancy subsisting between them having been created only by a parol demise from year to year. In support of the present action various grounds have been relied on by the plaintiffs; first, it is contended that, as the original lease for lives contained in the *habendum* a demise for the lives then named, and such other lives as should thereafter be added, the estate so created was capable of enlargement at Common Law, and was so enlarged by the nomination of the subsequent lives. I should be disposed to say that, upon the facts of this case, that argument cannot prevail. I agree with my Brothers FITZGERALD and CHRISTIAN that it is unnecessary to decide whether the statute of 5 G. 2, c. 4, s. 4, applies where the lives have all expired. Secondly, it was urged that as O'Callaghan purchased the interest of Nash, who was entitled to the benefit of a covenant for perpetual renewal made by Nash's lessor, and was himself the assignee of that lessor's estate, and, as O'Callaghan had thus, by his own act, rendered it impossible to fulfil that contract, as he could not renew to himself, it must be taken as if such renewal had in fact been executed, and an estate thus created to feed or keep up the sub-leases of 1769 and 1782. Whatever the effect of this state of facts might be in a Court of Equity, I believe we are all agreed that we cannot act upon such equitable principles for the purpose of validating those sub-interests in a Court of Law. Thirdly, it was contended that, even admitting that, in 1837, the terms of years demised by the leases of 1769 and 1782 expired at law, yet the subsequent payment of rent created a tenancy from year to year between O'Callaghan and the plaintiffs on the one hand, and between the plaintiffs, as representatives of Withers, and the defendants, as representatives of Atkins, on the other; so that the plaintiffs, although having themselves only an estate from year to year, may, as against their tenants holding under them as tenants from year to year, support an ejectment for non-payment of rent. This argument rests upon a passage in 2 *Fowl. L. & T.*, p. 1121, s. 51, which, however, only says that if a tenant from year to year demise from year to year, or for a term certain, there is a sufficient reversion to maintain an ejectment for non-

payment of rent, provided the undertenant derives *under an instrument in writing ascertaining the rent*. Neither this passage, therefore, nor any other authority, establishes that, in case of a mere implied or parol tenancy from year to year, an ejectment for non-payment of rent can be maintained. Fourthly, it was insisted that, even admitting, as an abstract proposition, that in the mere case of a tenancy from year to year created by the payment of rent, no ejectment of this nature lies, yet this is not that case; for that where, as here, a lessor holds for lives, and sub-demises, and the lives in his own lease have expired, he may, without having obtained a renewal, bring an ejectment for non-payment of rent, whilst the underlease is unexpired (*i. e.*, by effluxion of time). In support of this contention is cited a passage in 2 *Furl. L. & T.*, p. 1142, referring to a case of *Sparks v. Sparks*; but that case does not sustain any such proposition. That case rested entirely on estoppel, with which on this branch of the case we have nothing to do, although it may be relevant to another. Fifthly, it was pressed that all that it is necessary to show, under the 8 *G. 1.*, is, that the plaintiff in the ejectment has made a lease to the defendant, or to A B, to prove the counterpart of such lease, and prove three years' payment of rent, or other legal title derived from the lessor, and that the defendant is thereby estopped from showing that he no longer holds under the alleged lease, by reason of the expiration of the estate which, in fact, his lessor had at the time when he made the lease. It appears to me, however, that this is altogether a misconception of the principle of law, which is that, although a tenant cannot say that his lessor *nil habuit in tenementis* when he made the lease, yet he can show that his landlord's estate has expired. Where an interest passes there is no estoppel. That has been settled by *England v. Slade* (a), and *Doe v. Ramsbottom* (b), and has recently been recognised as law by Sir P. Wood, V. C., in *Langford v. Selmes* (c). There is nothing in any of the statutes relating to ejectments for non-payment of rent to alter the rule of law in this respect. Sixthly, it was alleged that, at all events, this ejectment is maintainable under

T. T. 1859.
Esch. Cham.

FOOT
v.
WARREN.

(a) 4 T. R. 382.

(b) 3 M. & S. 516.

(c) 3 K. & J. 220.

T. T. 1859.
Exch. Cham.

FOOT
 v.

WARREN.

the 25 *G. 2*, c. 13, which allows an ejectment for non-payment of rent where a party enjoys under an article in writing ascertaining the rent, although not containing an actual demise; on this principle that where a tenant holds under a lease which has expired, and rent has been received after the expiration of the lease, a tenancy from year to year is created, regulated by the terms of the expired lease, which, for this purpose, may be considered *an article in writing* within the 25 *G. 2*, c. 13. But I am of opinion, in the first place, that the tenant does not hold under or enjoy under any written article, but under a new contract by parol demise, upon terms similar to those in the expired lease, and on which new contract alone rent is recoverable as for use and occupation; and, in the second place, that this statute of *G. 2* relates not to such a case as the present, but only to a *contract* for a demise, not amounting to an *actual demise*. In the case of the tenancy from year to year, on the terms of the expired lease, such tenancy is an *actual demise*. I think, therefore, that such a case as the present is out of the words, and as clearly out of the spirit, of the 25 *G. 2*, c. 13. Seventhly, it was said that, under the authority of *Thomas v. Packer*, this ejectment is maintainable, inasmuch as that is a direct authority to show that, where a lease contains a clause of re-entry for non-payment of rent, and such lease expires, and a tenancy from year to year is afterwards created by payment and receipt of rent, such clause of re-entry is to be considered as incorporated in the implied tenancy, and, consequently, that ejectment for non-payment of rent will lie. In the first place, it does not appear whether the ejectment in that case was brought under any statute or at Common Law; in the next place, the law of ejectment for non-payment of rent is never alluded to; in the third place, even if it were alluded to, it cannot regulate the law of this country, founded upon a whole code of enactments, not one of which is in force in England.

RICHARDS, B.

My mind has fluctuated a good deal in this case; and although I cannot say that my mind is now free from doubt, yet I am disposed to be of opinion that the proper judgment of the Court is to award a *venire de novo*.

PICOT, C. B.

T. T. 1859.

Exch. Cham.

FOOT
v.

WARREN.

I feel the same difficulty which has operated upon the mind of my Brother RICHARDS; but I am not able to remove that difficulty. I concur in the opinions which have been expressed by my Brother FITZGERALD, and also in the reasons which he has given for those opinions, as to almost every portion of the case, except one. I do not think it necessary to decide, in the present case, whether ejectment for non-payment of rent can be maintained upon a tenancy from year to year, created by parol, without writing, but with a condition of re-entry. But, notwithstanding what has been said, I am not aware that it has been the general sense of the Profession that such an ejectment cannot be maintained where there is such a tenancy (namely, a tenancy from year to year) under a *writing*, by which the rent is ascertained. That certainly appears not to have been the opinion of one who had considered the subject maturely, and whose authority has been alluded to in terms of such high and just eulogy by my Brethren FITZGERALD and CHRISTIAN. Mr. *Furlong*, I think, intimates very plainly his opinion (which may be considered as representing the views of some, at least, of the Profession when he wrote), that ejectment for non-payment of rent is maintainable where there is a holding, for a yearly tenancy, under a written demise or contract: *Fur. Land. and Ten.*, pp. 1121, 1129, 1142. He refers (p. 1139) to *Jack d. Warner v. Martin (a)*, as a case in which the question was discussed, but upon which the Court abstained from expressing an opinion. In another passage of his book (p. 1142), he lays it down, as a distinct proposition, that, "If "a person seised of lands for lives renewable for ever demises for "different lives, or for years, and all the *cestui que vies* named in "the chief lease die, without any renewal having been procured, "though the legal estate in the original lease has determined, still "the lessor may maintain ejectment for non-payment of rent, whilst "the under-lease is unexpired." That is, in effect, the case before us; and I think the proposition which I have read furnishes, when the known and long experience of the author is considered, strong evidence that the maintenance of ejectment for non-payment of rent,

(a) 2 Jebb & S. 424; S. C., 3 Ir. Law Rep. 79.

T. T. 1859.
Exch. Cham.
 FOOT
 V.
 WARREN.

under such circumstances, was not against the general sense of the Profession in his time. He cites *Spark's case*, as sustaining the proposition; and I may add (without discussing how far that case does sanction it), that some colour is given for Mr. *Furlong's* view of that authority by the case, decided since he wrote, of *Doe d. Robinson v Bousfield* (a).

It is, however, perfectly intelligible why such an ejectment, even though maintainable, may not have been often resorted to in practice. A mesne landlord, in the circumstances supposed, will be entitled to treat the tenant, as at Law, a tenant from year to year, after payment of rent subsequently to the expiration of the legal estate granted by the head lease; for although the 25 G. 2 gives the right to eject for non-payment of rent, when the lands are held under an equitable written article, it does not give to the writing, for any other purpose, the force of a demise. A person so circumstanced (that is, having at Law a reversion for whatever estate, or a tenancy from year to year), desiring the possession of the lands in preference to the rent, may, by proceeding to eject upon a notice to quit, place himself in a position, in many respects, more advantageous than that which he could gain by proceeding to eject for non-payment of rent. In the former case, he puts an end at once to the tenancy at Law, and forces the tenant, if he seeks to retain the land, to institute a suit in Equity, and to establish a title there. In the latter case, he cannot effectually evict the tenant's interest under the sub-lease, until after the time for redemption shall have expired; and in that interval the forfeiture may be avoided, by proceeding in a Court of Equity for a redemption, and lodging the rent there, subject to the ascertainment (if disputed) and payment of the rent due by the tenant, on the one hand, and to the ascertainment and allowance of the amount of what the landlord, "without fraud deceit or wilful neglect, made of the premises," after the execution of the *habere*, on the other. The inconvenience to the landlord is very obvious, of being exposed to the inquiry which the statute prescribes in reference to his possession, pending redemption. The mere fact, therefore (if the fact be so), of ejectment for non-payment of rent

(a) 6 Q. B. 492.

not being resorted to in practice, in the memory of some of those now discussing the question, does not seem to me to furnish any such argument against its being maintainable, as has been pressed upon us at the Bar. It appears to me that the result of the Ejectment Code is, that when lands are held under an instrument in writing, containing an actual demise, whether with or without a condition of re-entry, or under a mere contract in writing, giving the tenant the right to hold, on payment of an ascertained rent, ejectment for non-payment of rent can be maintained so long as the enjoyment is under the written instrument, although, according to the true state of the title, if traced to the fee, the tenant, at Law, has only a tenancy from year to year. I agree that it may not be proper to construe the Irish Ejectment Code by the decisions upon the single English statute. The Irish legislation had to deal with a state of things, and with a condition of property, differing considerably from that which generally prevails in England. It had to deal with property greatly subdivided, held by a multitude of mesne tenants and undertenants, often under instruments very informally framed. We must presume that the Legislature intended to provide a remedy, adequate and adapted to the state of things for which they legislated; and we are at liberty to construe their words by reference to the subject-matter of their legislation. The 8 G. 1, c. 2, shows the difficulty, which was found in practice, of proving the existence of the reversion, in order to maintain ejectment; a difficulty which rendered it necessary for the Legislature to interpose, and to facilitate the proofs by which the plaintiff was to place himself in privity with the lease on which the ejectment was brought. Subsequently it was found necessary, by the 5 G. 2, c. 4, to enable the landlord to maintain ejectment, where there was a holding under a writing operating as a demise, but not containing a clause of re-entry for non-payment of rent; and, by the 25 G. 2, c. 13, the remedy was extended to cases where there was a holding under a contract in writing, which contained neither actual demise nor clause of re-entry. It has been said that one-seventh of the whole landed property of Ireland was,

T. T. 1859.
Exch. Cham.

FOOT
v.
WARREN.

T. T. 1859.
Exch. Chanc.

FOOT
 v.
 WARREN.

at one time, held under leases for lives renewable for ever^(a); and, considering the state of landed property with which the Legislature had thus to deal, I am disposed to give to the Ejectment Code such a construction as shall make it effectual in its application to the existing state of property in land, and not to interpose those technical objections in its application which it was the object of the whole code to remove; otherwise those very difficulties, which it was the manifest intention of the Legislature to remedy, may arise in every instance in which lands are held for lives renewable for ever, and in which a sub-lease is made for a term of years, or for different lives from those named in the original lease from the owner in fee. Wherever a lease for lives renewable for ever shall have created a sub-lease, for a term which shall outlast the lives for which, at Law, he himself holds, or which shall outlast any enlarged estate which he may obtain by renewal, during the existence of some of those lives (and, therefore, wherever a sub-interest for a long term has been carved out of such an estate or interest), the meane lessor, or those deriving under him, must be exposed to the difficulties which the present plaintiff has encountered, and by means of which he will be defeated, by our judgment in favour of the defendant. The present decision, if founded on the views against which I am now endeavouring to reason, will affect the oldest, even more than the latest, estates for renewable lives; because if, on the fall of all the lives, there is no possibility of enlargement (as there cannot be after the first set of *cestui que vies* have died, whatever be the form of renewal, or of nomination of new lives, prescribed in the head lease), then, no matter how large in quantity the sub-interest may be, ejectment for non-payment of rent will be impossible. I cannot give the Ejectment Code such a construction as will render it impossible to maintain ejectment for non-payment of rent, as to the sub-interests carved out of an estate held by a tenure by which so large a portion of the land of this country has been enjoyed, if I can give to it a reasonable construction, by which that result shall

(a) See *Jackson v. Saunders* (1 Sch. & Lef. 447); *Boyle v. Lysaght* (1 Bldg. P. C. 402).

be avoided. There is no controversy as to what is the legal effect of the lease of 1782. It was a demise for 950 years, carved out of the lessor's estate or interest; and that estate or interest was a term of 993 years, carved out of an estate or interest for lives renewable for ever, created by a lease with covenant for perpetual renewal. The lease of 1782, in express terms, purported to demise the lands for 950 years, with a covenant by the lessor for quiet enjoyment. It is perfectly plain that a contract was created by the lease of 1782, which included an obligation in the lessor to permit the lessee to enjoy the land for that term of 950 years. The ability to make that contract effectual, by securing a legal continuance of the term, may cease, if the lessor's interest in the lands ceases to be large enough to enable him to give that full effect to his contract; but the contract still remains. It is as binding and as capable of being enforced in a Court of Equity, to the full extent of the legal or equitable dominion of the lessor, as if it were a minute or contract executory in its form. Such being the contract, what are the acts of the parties? The lessor takes the rent ascertained by the contract; the tenant pays that rent, and holds the lands; and all this occurs not after, but during, the term of years for which it was contracted that the rent should be paid, and the lands should be enjoyed. In this state of facts then, wholly irrespective of the doctrine laid down in *Thomas v. Packer*—wholly irrespective of any incident arising out of the creation of a yearly tenancy, by holding over and paying rent—but treating the plaintiff's case as depending on the terms of the contract—I find it impossible to say that this was not an enjoyment of the lands, under a contract contained in the lease of 1782, within the meaning of the 25 G. 2, c. 13. How are we to treat contracts of this kind, where, at Law, the whole interest does not pass, which the lessor professes to create? If the lessor had only a yearly tenancy, and granted a lease of 999 years, there is authority for holding that he would have created a good term for that period, if his own tenancy so long continued (a). Suppose a person, holding

T. T. 1859.
Esch. Cham.
 FOOT
 V.
 WARREN.

(a) See *Mackay v. Mackreth* (2 Chitty Rep. 461; 3 T. R. 14; 4 Doug. 213; 3 Wentworth Plead. 461).

T. T. 1859.
Esch. Cham.

FOOT
 v.

WARREN.

under an executory contract for a term of 999 years, leases for lives renewable for ever; and, suppose sub-leases are again created out of this interest, cannot ejectment for non-payment of rent be maintained by each of these lessors? In *Shenton v. Corbally* (a), Sir W. M'Mahon expressed a strong opinion in the affirmative, though, of course, he pronounced no decision upon the point. His words are:—"When the titles of the landlord and tenant are both equitable, consisting of articles, I presume the landlord may recover under this statute (25 G. 2, c. 13); yet there can be no reversion at Law, both these estates being but a tenancy from year to year; but be this as it may, if there had been a renewal, the landlord could have tried this, or some other remedy, if his rent had been withheld." I refer to the intimation of the opinion of the Master of the Rolls in that case, because it was decided many years before Mr. *Furlong* wrote; and, according to that opinion, ejectment for non-payment of rent may be maintained by a *mesne* lessor, where his tenancy has become, at Law, only a tenancy from year to year; the enjoyment of the sub-tenant being governed by an instrument purporting to grant a term under which the lands were intended to be held. It would be a rather startling consequence that, if a person himself holding only from year to year enters into a contract for a lease for 900 years, he shall be entitled to eject his tenant for non-payment of rent; but that, if he enters into such a contract, himself holding for lives renewable for ever, though his own equitable interest under the covenant for renewal has never been disturbed, and although new lives have been nominated and agreed on, and the old rent has been constantly paid, without the execution of a formal instrument of renewal, he cannot, after the lives in his head lease have dropped, maintain such an ejectment. I find, in the present case, according to the express words of the 25 G. 2, c. 13, a contract in writing, under which the lands are enjoyed, and by which the rent is ascertained; and I confess I require some stronger reason than any which I have yet heard, to bring me to the conclusion that the remedy by ejectment

(a) 1 Hog. 403, 430.

for non-payment of rent does not apply to such a case, coming, as I conceive it does, within the very terms of the Act of Parliament.

There has been a great deal of discussion upon a decision which perhaps is not exactly in point, as regards the case now before us; I allude to *Thomas v. Packer*. The decision there seems to me to be a perfectly sound one. It only followed up a long series of decisions in England, including *Doe d. Thompson v. Amey* (a); *Doe d. Bromfield v. Smith* (b); *Doe d. Oldershaw v. Breach* (c); *Doe d. Tilt v. Stratton* (d). It appears to me that if the question were now to be considered, for the first time, in the Court of Error, there would be found much reason for contending that the words "lessor" and "*lease*," in the 11 *Anne*, c. 11, are not confined to cases where the relation of lessor and lessee is created by an instrument in writing. In the Statute of Frauds (e), the word "*lease*," in section 1, is used to import a parol lease; "*all leases, &c., made or created by livery and seisin, or by parol, &c., shall have the force and effect of leases or estates at will only.*" And the 2nd section excepts, from the operation of the 1st section, "all leases not exceeding the term of three years from the making thereof," &c. If a parol lease for the term of three years be good, there can be no reason why it should not be good with all the incidents which by law can be annexed to a demise for such a term, and, among them, that of a condition for re-entry for non-payment of rent. It is, however, wholly unnecessary, in my view of the present case, to consider that topic; because I am of opinion, upon the best consideration which I have been able to give to the case now before us, that the lands in question have been enjoyed under an instrument in writing, which was, during the continuance of the lives in the head lease, a demise for a term of 950 years, dependent upon the lives, and which, after the determination of those lives, amounted to a continuing contract in writing, under which contract the lands have continued to be enjoyed, and which contract is still subsisting.

There is one topic remaining, as to O'Callaghan's peculiar position.

(a) 12 Ad. & El. 476.

(b) 6 East, 530.

(c) 6 Rep., N. P. C., 106.

(d) 4 Bing. 446.

(e) Section 1.

T. T. 1859.
Each. Cham.

FOOT
v.

WARREN.

I did, at one time, consider that there was a great difficulty in deciding that O'Callaghan was a person holding as tenant to the plaintiffs; but I think he must be considered either as a trespasser, or as being in privity with the person who held as tenant under the plaintiffs when O'Callaghan obtained possession. The form of the issue, however, precludes any question upon that point. I agree with my Brother CHRISTIAN, that the form of pleading does not affect the principles of law; there must be such a holding as is required by the Ejectment Statutes. But the form of the issue shows that, if the lands are held by *any* person as tenant to the plaintiffs, the plaintiffs would be entitled to recover; and, if I am right in my view of the Ejectment Statutes, a tenancy *does* exist, still undetermined within those statutes, *under* the instrument of 1782. On all the other points, I concur with the other Members of the Court; but, holding the opinion which I have expressed, in reference to the applicability of the Ejectment Code to the present case, I think the judgment of the Court below ought to be reversed; that there ought not to be a *venire de novo*, but that judgment should be given for the plaintiff in error, who was defendant below, and who obtained the verdict.

MONAHAN, C. J.

I concur in the opinion expressed by the majority of the Court. The plaintiffs have altogether failed to satisfy my mind, at least, that this ejectment for non-payment of rent can be maintained. It is unnecessary for me to state at any length the grounds upon which I have come to that conclusion; the more especially, as I unfeignedly say that not a single argument occurred to my mind which has not been already put forward more clearly than I could express them by my Brothers FITZGERALD, CHRISTIAN and GREENE, who have gone at length and in detail into their reasons. I am quite satisfied that there is no foundation for the fanciful application of the doctrine of enlargement to this case. If that doctrine does apply to it, *cadit questio*; because the result is, that the lease of 1782 is still a valid and subsisting lease for 950 years. But I confess it does occur to me that, to argue that because Nash, in 1769, being

possessed of a lease for certain lives then in existence, and such other lives as should be added thereto, pursuant to a covenant therein for perpetual renewal, carved a term out of that lease; nevertheless, although the lease for lives is at an end by death of the leasees, and the lessor's interest has been surrendered, yet that the terms carved out of it are subsisting, appears altogether inconsistent with the doctrine of enlargement. The effect of the surrender was not to enlarge, but to merge the lease in the reversion; of course without prejudice to any subsisting legal estates. I therefore agree with the other Members of the Court that there is no foundation for the application of the doctrine of enlargement to this case. This being the opinion of the majority of the Court, on the doctrine of enlargement, it is not necessary to decide whether the renewal of 1794 operated as a continuance of the then subsisting under-leases. Though this is so, I do not wish it to be understood that I personally entertain any doubt as to the construction of the 5 G. 2, c. 4, s. 4 (*Ir.*)—[His Lordship here read the section.]—It appears to me clear that this section applies only to surrenders of existing, and not of expired, leases. This is, however, only my individual opinion.

There being then in the case before us no demise existing, except a parol tenancy from year to year, the question is not, whether there may not be a yearly tenancy on which ejectment for non-payment of rent can be maintained; but whether the yearly tenancy in this case is such that an ejectment for non-payment of rent can be maintained upon it? If this were the case of an express tenancy from year to year, created by a lease or demise in writing, with the ordinary clauses and covenants between landlord and tenant, I do not mean to express any opinion as to whether, in such a case, an ejectment for non-payment of rent under the statutes could or could not be maintained. That is the question on which the Judges, in the cases which have been referred to, have declined to express an opinion; but I deny altogether that ejectment for non-payment of rent can be maintained on any holding created merely by parol. My impression as to the case of *Thomas v. Packer* is, that it did not enter into the imagination of Counsel there that they were

T. T. 1859.
Esch. Cham.

FOOT
v.
WARREN.

T. T. 1859.
Exch. Cham.

FOOT
 v.

WARREN.

arguing a case on an ejectment for non-payment of rent, under the English Common Law Procedure Act ; * it would rather appear to me to be an ejectment at Common Law for forfeiture, where the rent was behind-hand beyond the time stipulated for its payment, and the landlord had a right under the lease, on that account, to re-enter. But even assuming that that case was under the English Common Law Procedure Act, which is nearly similar to the 11 Anne, c. 11 (*Ir.*), yet I am not here to construe that Act standing alone, but to construe it in connection with several other Acts, all together constituting a code ; and, in the 8 G. 1, c. 2, s. 1 (*Ir.*), I find a provision that the landlord is to make "due proof of the perfection of the counterpart of the lease." If, therefore, as I clearly hold, there must (prior to the 25 G. 2, c. 13) have been a written instrument containing a legal demise, the question is, is the lease of 1782 such a document as that the present ejectment can be maintained upon it? The demise made by that lease depended on the continuance of the estate of the lessor ; that estate depended on the subsistence of the lease of 1769, which, in my opinion, ceased before 1794, and immediately thereupon the holding ceased to be under the lease of 1782 ; until rent was paid and accepted, no new tenancy was created, and the tenant might have been ejected without any notice to quit ; but the moment a yearly rent was paid, it is to be thence inferred that the parties have entered into a parol contract to hold from year to year, on the terms on which they formerly held, so far as those terms are applicable to a tenancy of that description. I cannot distinguish the case from the ordinary one where a tenant for life of lands makes a lease for 200 years, and dies, the lessee's interest thereupon determines, but the remainderman continues to receive the rent ; by so doing, however, he only creates a parol yearly tenancy, because the lessee's former estate has altogether determined. The proof of triennial possession, under the 8 G. 1, c. 2, is merely substitutional for a more complete deduction of title ; but the defendant is not thereby precluded from showing that his lessor's title has determined since the making of the lease. I do not apprehend that the difficulties which have been

* 15 & 16 Vic., c. 76, s. 210.

suggested will follow from our present decision. I do not think that the landlord is remediless, because he cannot maintain ejectment for non-payment of rent on a parol yearly tenancy. By notice to quit, the landlord may determine the tenancy and recover the land, if he thinks fit.

T. T. 1859.
Esch. Cham.
 FOOT
 v.
 WARREN.

The only remaining question is, whether the lease of 1782 is an article, minute or contract in writing, within the 25 G. 2, c. 18 (*Ir.*). Now it is only necessary to read the recital in the 2nd section of that statute to see what is the nature of the "*article, minute or contract in writing*" which is contemplated by it. It recites that, "Whereas several lands, &c., are enjoyed under "articles, minutes or contracts in writing, *whereby* the rent payable "for the same is ascertained, but the said articles, &c., do not "contain an *actual* demise;" and it then proceeds to enact a remedy, and to enable ejectment for non-payment of rent to be maintained, as if the writing had contained an actual demise, and as if a clause of re-entry had been expressly specified therein. This statute was intended to apply to accepted proposals and agreements for leases, but it was not intended to prevent a tenant from showing that the lease under which he formerly held had determined. In *Shenton v. Corbally* (a), Sir W. M'Mahon, the Master of the Rolls, was of opinion that a covenant for perpetual renewal was not an "article, minute, or contract in writing," within this statute. In my opinion, the judgment of the Court of Queen's Bench should be affirmed, and a *venire de novo* awarded.

(a) 1 Hog. 403.

NOTE.—See *Piggott v. Stratton* (29 Law Jour., Ch., 1).

T. T. 1858.

M. T. 1858.

*Queen's Bench.**June 15.**Nov. 18, 24.**Exch. Cham.*

E. T. 1859.

T. T. 1859.

May 4, 7, 28.

MOORE

v.

THE GREAT SOUTHERN & WESTERN RAILWAY CO.

(In the Queen's Bench and Exchequer Chamber.)

The plaintiff occupied a cottage and a small piece of land, on a level with and abutting on a public high road, from which a short way or passage over the plaintiff's land afforded access to his cottage. A Railway Company, in the execution of the works of their Railway, lowered the public high road seven feet, leaving the plaintiff's land and cottage on the edge of a precipice of that height, and thereby obliging the plaintiff to make use of a step-ladder in order to obtain access from the public high road to the way or passage leading over his land to his cottage. An action having been brought by the plaintiff against the Railway Company, under the Railways Clauses Consolidation Act 1845 (8 & 9 Vic., c. 20), ss. 53, 55—

ACTION for injuries to the plaintiff's house and premises by the defendants, in the execution of the works of their Railway.

First count.—That the defendants, on the, &c., cut through, sunk and used a certain public road, leading from, &c., to, &c., opposite to the messuage of the plaintiff hereinafter mentioned; and thereby rendered the said public road impassable for, dangerous and extraordinarily inconvenient to, passengers and carriages, and to the plaintiff, being one of the persons entitled to the use thereof, in the manner herein mentioned; and that the defendants did not, before the commencement of such operations, cause a sufficient road to be made instead of the road so interfered with; and did not maintain any such substituted road in a state as convenient for passengers and carriages as the road so interfered with; and the plaintiff saith that he was, at the time of the committing of the said grievances by the defendants, and thence hitherto hath been, and

Held, by the Exchequer Chamber (affirming the judgment of the Queen's Bench), that the action was not maintainable, the injury complained of by the plaintiff being an injury of a permanent nature to his land; and, therefore, the subject of compensation by the arbitrator, pursuant to the Railway Clauses Consolidation Act 1845, s. 6, and the 14 & 15 Vic., c. 70.—[PROOT, C. B., *dissentiente*].

A plaint contained three counts for special damage, alleged to have accrued to the plaintiff, by reason of a breach of duty on the part of the defendants, and also three counts in trespass *quare claus. freg.* Issues were knit upon all the counts. The trial proceeded, mainly, if not entirely, on the counts for special damage. The jury found generally for the plaintiff, with £50 damages. There was some evidence to sustain the counts in trespass. The Court of Exchequer Chamber decided that the action was not maintainable on the counts for special damage; and, although satisfied that the damages were given principally, if not entirely, in respect of those counts, yet, not being able to apportion the damages, awarded a new trial.

still is, lawfully possessed of a certain messuage and premises, with the appurtenances, situate and being in the county of Tipperary, adjoining the said public road; and by reason thereof the plaintiff, during all the time aforesaid, ought to have had, and still ought to have, a certain right of way over the public road so interfered with; that is to say, a way over, from and out of the said public road into the said messuage and premises of the plaintiff, with the appurtenances, and from and out of the said messuage and premises of the plaintiff, with the appurtenances, unto and over the said public road, for the plaintiff, his family and servants, on foot, and with carts and horses, to go, return, pass and re-pass at all times; and the plaintiff saith that he hath suffered special damage, by reason that the defendants have made said way broken and impassable, by digging across same, and by sinking same and said public road, to wit ten feet, and have not caused another sufficient road to be made before they interfered with the said public road by so sinking it opposite to the said messuage of the plaintiff, and have not yet caused any sufficient road to be made; whereby the said way from the plaintiff's messuage and premises, with the appurtenances, into and over the said public road, has been made dangerous and extraordinarily inconvenient to the plaintiff, his family, and servants, and the plaintiff has been unable to bring turf to his house, or manure to his farm-yard, and the plaintiff has been deprived of his previous mode of access to the said messuage and premises: and the plaintiff avers that he hath sustained such special damage by the interruption of said way, and by the premises, to the amount of £100.

Second count.—That the defendants, on the, &c., in exercise of the powers granted by the Railways Clauses Consolidation Act 1845, and other the statutes in that case made and provided, cut through, sunk and used a certain public road leading from, &c, to, &c., opposite to the house and messuage of the plaintiff herein mentioned, and thereby rendered the said public road extraordinarily inconvenient to passengers and carriages, and to the plaintiff, being one of the persons entitled to the use thereof; and the defendants did not, before the commencement of any such operations, cause a sufficient road to be made instead of the road so interfered with; and the

M. T. 1858.

Queen's Bench

MOORE

v.

GT. S. & W.

RAILWAY.

M. T. 1858.
Queen's Bench

MOORE
v.

GT. S. & W.
RAILWAY.

plaintiff, at the time of the committing of the said grievances by the defendants, and thence hitherto, hath been and still is lawfully possessed of a certain house, messuage and premises, in the county of Tipperary, adjoining said road; and by reason thereof the plaintiff, during the the time aforesaid, ought to have had, and still of right ought to have, a certain right of way into and over the said public road so interfered with; that is to say, a way over, from and out of the said public road into the said messuage and premises of the plaintiff, with the appurtenances, and from and out of the said house, messuage and premises of the plaintiff, with the appurtenances, into and over the said public road, for the plaintiff, his family and servants, on foot and with carts and horses, to go, return, pass and re-pass at all times; and the defendants, by sinking the said public road, to wit, of the depth of fourteen feet, have destroyed said way of the plaintiff, and the said way remains broken and impassable, and the plaintiff hath suffered special damage, by reason that the defendants have left said way broken and impassable, and did not cause another sufficient road to be made before they interfered with the said public road, by so sinking it opposite the said messuage of the plaintiff, whereby the said way from the plaintiff's messuage and premises, with the appurtenances, into and over the said public road, hath been made dangerous and extraordinarily inconvenient to the plaintiff, his family, and servants; and the plaintiff thereby has had been deprived of his previous mode access to the said messuage and premises, and has been obliged to procure a step-ladder in order to obtain access to his house, and has been unable to bring the manure of his farm to his dunghill and farm-yard, and has been unable, except at great expense, to bring turf for fuel to his house aforesaid: and the plaintiff avers that he has suffered such special damage by reason of the premises, to the amount of £200.

The third count stated that the plaintiff was possessed of a house, messuage and premises, &c., and by reason thereof was entitled to a right of way over a public road, &c.; and that the defendants had sunk such public road, and had broken and interrupted said way, by sinking and digging, and had rendered it broken and

impassable, and had not caused any sufficient road to be made whereby the plaintiff could obtain access to his premises as aforesaid: it also averred the same special damage as in the second count.

M. T. 1858.
Queen's Bench.

MOORE
v.
GT. S. & W.
RAILWAY.

The fourth, fifth and sixth counts were in *trespass quare clausum fregit*.

The first and second defences to the first count of the plaint traversed the rendering the public road impassable and extraordinarily inconvenient to passengers and carriages, and to the plaintiff; and also traversed the special damage. Third defence to the first count; that the way from and out of the said public road into the said messuage and premises of the plaintiff, in said count mentioned, was not a carriage-road, horse-road, tram-road or railway, either public or private, but a piece of ground which abutted upon the said public road, and nearly on a level therewith, over which the plaintiff had access to his house; and that defendants, in the due exercise of the powers given to them by the statutes in that case provided, lowered the said public road upon which the said ground so abutted; and that if the house and premises of the plaintiff have been injuriously affected thereby, the plaintiff ought to have pursued the remedy in that behalf by the said Acts of Parliament provided, and had not any right to resort to or sustain an action at Law for said alleged injury. First defence to the second count of the plaint traversed the rendering the said public road, therein mentioned, extraordinarily inconvenient to passengers or carriages and to the plaintiff. The second defence to the second count stated that the defendants sunk the said public road in the due exercise of the powers given to them in that behalf by the statutes in that case provided; and that if said way of the plaintiff, in said second count mentioned, was thereby injuriously affected, he ought to have pursued the remedy in that behalf by the said Acts of Parliament provided, and had not any right to resort to or sustain an action at Law for said alleged injury. By a third defence to the second count, the defendants traversed the special damages alleged. The first defence to the third count of the plaint was in similar terms to the second defence to the second count.

M. T. 1858.
Queen's Bench.

MOORE

v.

GT. S. & W.
 RAILWAY.

By a second defence to the third count, the defendants traversed the special damage.

Third defence to third count; that the defendants did cause a sufficient road to be made, whereby the plaintiff could obtain access to his premises, that is to say, steps from the said public road so sunk, as in said paragraph mentioned, being as convenient a mode of access as the defendants could make, consistently with the execution of their undertaking, and due exercise of their powers, according to the statutes in that case provided; and the defendants deny that the plaintiff has been obliged to provide a step-ladder, in order to obtain access to his house, as in said count alleged. The fourth, fifth and sixth defences traversed the breaking and entering of the plaintiff's lands; and, by a further defence to the fourth, fifth and sixth counts, the defendants justified the several trespasses therein mentioned, under the powers given to them by the several statutes in that case provided, and alleged that if the plaintiff sustained any injury, or if his property was injuriously affected thereby, he ought to have pursued the remedy in that behalf by said Acts of Parliament provided, and had not any right to resort to or sustain an action at Law for said alleged injury. The plaintiff demurred to the second defence to the second count, on the grounds that the plaintiff was not bound by the Acts of Parliament, in said second defence mentioned, to pursue any other remedy than by action at Law; and that the defendants should have shown, in and by said defence, what remedy, in fact, the plaintiff ought to have pursued under said statute; and that the causes of action in said second count stated were good in law, and were not avoided by anything stated in said second defence.

The demurrer was argued, on the 15th of June 1858, before PERRIN and O'BRIEN, JJ., by *D. C. Heron* and *R. Armstrong* for the plaintiff, and by *G. Fitzgibbon* and *C. J. Coffey* for the defendants, when their Lordships reserved their judgments.* The plaintiff took issue in fact on the remaining defences, and the case was tried before the LORD CHIEF JUSTICE of the Queen's Bench and a special

* *Post*, p. 57.

jury at Dublin, at the Sittings after Trinity Term 1858; when it was proved that the high road had been lowered, to a depth of seven feet, opposite to the plaintiff's house and lands, to which the plaintiff could only obtain access from the road by means of a step-ladder. Evidence was also given, on the part of the plaintiff, to prove the averments in the summons and plaint, and that the plaintiff had sustained the special damage therein complained of. The jury found a verdict for the plaintiff, with £50 damages; and the learned LORD CHIEF JUSTICE reserved liberty to the defendants to have a nonsuit entered for them, in case the Court above should be of opinion that the action was not maintainable.

M. T. 1858.
Queen's Bench.
 MOORE
 v.
 GT. S. & W.
 RAILWAY.

G. Fitzgibbon, on the 5th of November, having obtained a conditional order, pursuant to the leave reserved—

R. Armstrong (with him *D. C. Heron*) now showed cause.

The interruption of the plaintiff's usual access to his house, occasioned by the Company lowering the public road adjoining, is not a permanent injury for which he is entitled to obtain compensation by means of the arbitrator; it is special damage to the plaintiff, for which a right of action is specially saved by the Railway Clauses Consolidation Act 1845 (8 & 9 Vic., c. 20), section 55. By section 58 of that Act, the Railway Company, before commencing their operations, when it may be necessary to cut across or sink any road, shall substitute a road, instead of the road so interfered with by them; if they neglect to do so, then, by section 54 they become liable to a penalty; and, by section 55, where a party has suffered special damage, by reason of such works, he may recover the amount of such special damage by an action on the case against the Company. This action, therefore, is maintainable. The cases of *Chichester v. Lethbridge* (a), *Dobson v. Blackmore* (b) and *Rose v. Groves* (c), show how slight is the injury which the Court will consider sufficient to constitute special damage.

(a) Willes, 71.

(b) 9 Q. B. 991; S. C., 11 Jur. 556; 16 L. J., Q. B., 233.

(c) 5 M. & G. 618; S. C., 6 Scott, N. R., 645; 7 Jur. 951; 12 L. J., C. P., 251.

M. T. 1858. *G. Fitzgibbon and J. D. Fitzgerald* (with them *C. J. Coffey*),
Queen's Bench. contra.

MOORE
 v.
 GT. S. & W.
 RAILWAY.

This is not a case within the 8 & 9 *Vic.*, c. 20, s. 55, the obstruction being permanent, and not temporary. The damage which the plaintiff alleges he has suffered is damage which he must continue to suffer, so long as he occupies his present house; and he might have obtained compensation for it by proceeding before the arbitrator, who, by the 14 & 15 *Vic.*, c. 70, ss. 9, 10, 11, continued by the 21 & 22 *Vic.*, c. 34, is substituted for a jury, because the lands are injuriously affected, within the meaning of the Railway Clauses Consolidation Act (8 & 9 *Vic.*, c. 20, s. 6): *The London and North Western Railway Company v. Smith* (a); *The East and West India Docks and Birmingham Junction Railway Company v. Gattke* (b); *The London and North Western Railway Company v. Bradley* (c); *The South Staffordshire Railway Company v. Hall* (d). The plaintiff might even have compelled the arbitrator, by mandamus, to assess compensation for the injury complained of: *Regina v. The Eastern Counties Railway Company* (e). The plaintiff's only remedy is that which is given to him by the Railway Code. Two classes of cases are contemplated by that code for compensation; the first being where land is taken by the Company; and the other, where land not taken is injuriously affected by the construction of the Company's works. If the case come within either of these classes the party injured must proceed before the arbitrator, to have the amount of compensation assessed. The present case falls within the latter class, and the plaintiff has not sustained such special damage as entitles him to bring an action under section 55: *Watkins v. The Great Northern Railway Company* (f).—[LEFROY, C. J. This is a permanent injury.—CRAMP-
 TON, J. The whole case must depend upon the construction to be

(a) 1 Mac. & G. 216; S. C., 13 Jur. 417.

(b) 3 Mac. & G. 155; S. C. 15 Jur. 261; 20 L. J., Chan., 217.

(c) 3 Mac. & G. 336; S. C., 15 Jur. 639.

(d) 1 Sim., N. S., 373; S. C., 15 Jur. 322.

(e) 2 Q. B. 347.

(f) 16 Q. B. 961; S. C., 15 Jur. 1127; 20 L. J., Q. B., 391.

put upon section 55 of the 8 & 9 Vic., c. 20.]—That section only applies where a party suffers special damage, by reason of the Railway Company having failed to make the substituted road before interfering with the existing road. It would be special damage if a person went out at night, and, not knowing of the precipice caused by the lowering of the road, were to fall down it and break his leg.—[PERRIN, J. Special damage, I have always understood to be damage which an individual suffers, but which is not suffered by others. For instance, if a heap of gravel be thrown upon a public road, and a man fall over it, in that case I always thought an action was maintainable].—Sections 53-55 refer to the obstruction of public roads; in this case the only road interfered with is a public road, not the plaintiff's road; and, by these sections, where the public are inconvenienced by the Railway Company interfering with a public road, a remedy is provided. The law is completely settled by a very recent case decided in this country, *Little v. The Dublin and Drogheda Railway Company* (a). The object of the Railway Code is to prevent a Company being harassed by constantly recurring actions.

M. T. 1858.
Queen's Bench.
 MOORE
 v.
 GT. S. & W.
 RAILWAY.

They also referred to *The Caledonian Railway Company v. Ogilvy* (b), in which Lord St. Leonards comments on the case of *Regina v. The Eastern Counties Railway Company* (c); *Galgay v. The Great Southern and Western Railway Company* (d); *Tanner v. The South Wales Railway Company* (e).

D. C. Heron, in reply.

The fallacy of the argument, on the other side, is in assuming that the injury done to the plaintiff is necessarily permanent, and that it is impossible to make an accommodation road for him. The duty to make that accommodation road is cast upon the defendants by the Act of Parliament. The present action is brought for the special damage sustained by the plaintiff, by reason of the defendants not having made a sufficient road, before they interfered

(a) 7 Ir. Com. Law Rep. 82.

(b) 2 Macq. H. L. Cas. 229.

(c) *Supra*.

(d) 4 Ir. Com. Law Rep. 456.

(e) 5 EL. & BL. 618; S. C., 1 Jur., N. S., 1215; 26 L. J., Q. B., 7.

M. T. 1858.
Queen's Bench.

MOORE

v.

GT. S. & W.
RAILWAY.

with the existing road; that fact is averred in the plaint, and is traversed. A right of action must necessarily exist for the injury so sustained by the plaintiff; the arbitrator can award no compensation for such special damage as this, he having power to grant compensation only for a permanent injury to the land. But this is not a permanent injury to the land, within the meaning of the Act; for, wherever the Company do their duty, by making a sufficient road, the injury complained of will cease: *Attorney-General v. The South Western Railway Company (a)*. The remedy by mandamus is not interfered with by section 55, it is concurrent with the right to bring an action: *Regina v. The South Eastern Railway Company (b)*; *Pilgrim v. The Southampton and Dorchester Railway Company (c)*. The case of *Watkins v. The Great Northern Railway Company (d)* decided that the Railway Acts took away the Common Law right of action, in cases where private rights of way have been interfered with, unless special damage has been sustained. In this case a special jury found £50 for the special damage sustained by the plaintiff. This action is framed under the combined operation of sections 6, 53 and 55 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vic., c. 20).

Cur. ad. vult.

LEFROY, C. J.

Nov. 24.

This case comes before the Court upon a point saved, viz, whether, upon the evidence adduced at the trial, upon which a verdict with damages was found for the plaintiff, this action lies against the defendants? We are all of opinion that the action does not lie. The circumstances material to the decision of this case are not many. It appears that the plaintiff was possessed of a house and land adjoining a public road, and that he had a private road or way leading from his house and premises to this public road, by which he had access to the public road, and had the use and enjoyment of it for the purpose of bringing things to his private road for the use of his land and house. It also appears that the

(a) 3 De G. & S. 439.

(b) 4 H. L. Cas. 471.

(c) 7 C. B. 205.

(d) *Supra*.

defendants, a Railway Company, had authority to lower the public road, in order to give a sufficient passage under one of their bridges, which passed over it; and the consequence of this lowering of the public road, on which the plaintiff's premises abutted, was to create a fall of several feet from the level of his premises to the road when lowered, which made it impossible for him to have access to it, or to use it as he had been accustomed to do; but the plaintiff's private road was not taken, or in any manner used, or actually injured by the Company. There was nothing wrong in the Railway Company thus lowering the public road, it being one of the matters provided for by their Private Act of Parliament. The consequence, however, of what the Company had done was this, that the plaintiff, being thereby deprived of the use of the public road, had been obliged to resort to contrivances for the purpose of getting things therefrom to his premises, which contrivances would not have been necessary had the public road not been lowered. The plaintiff, accordingly, brings his action against the Company for the inconvenience which he has suffered in bringing his turf, manure and other things to his premises; and at the trial he gave evidence enough of the public road having been so taken possession of and altered by the Company, and of the inconvenience which he suffered. The question then arises, can the plaintiff maintain an action for this inconvenience? Or must he look to the statutable remedy for his lands being injuriously affected by the construction of the Railway, and for damages sustained by reason of the exercise of the powers conferred on the Company? It appears to me that the question resolves itself into this: has the plaintiff, by the lowering of this public road, suffered any special inconvenience or disadvantage beyond that sustained by every member of the community, who, by this act of the Company, have been prevented from using that public road in the same manner as theretofore he had been accustomed to use it? That the plaintiff's land and premises have sustained an injury, and, that for that injury he is entitled to redress, there can be no doubt; but, is the mode of obtaining that redress by this action? The plaintiff's road over his own land has not been taken, injured or interfered

M. T. 1858.

Queen's Bench

MOORE

v.

GT. S. & W.

RAILWAY.

M. T. 1858.
Queen's Bench

MOORE
v.

GT. S. & W.
RAILWAY.

with at all; but his land and his property in it is injuriously affected by his communication with the public road being cut off, and that injury and its consequences are a damage occasioned by the Company, in the exercise of the powers conferred upon them for the construction of the Railway.

This question arises upon the 8 & 9 *Vic.*, c. 20, the Railways Clauses Consolidation Act; and I need only refer to a few sections of that Act, which, by its plain terms, as appears to me, completely disposes of this case. The first section of the Act to which I refer is section 6. Now, this section provides that the Company, in the exercise of the power given to them by their Special Act, to construct their Railway, and to take lands for that purpose, shall be subject to the provisions of the Lands Clauses Consolidation Act; and also, that the parties whose lands shall be taken or used, for the purposes of their Railway, or "*injuriously affected* by the construction thereof," shall be entitled to full compensation for the value of the lands so taken or used, and "for all damage sustained "by reason of the exercise of the powers by the Special Act, or any "other Act incorporated therewith, vested in the Company; and, "except where otherwise provided by this or the Special Act, the "amount of such compensation shall be ascertained and determined "in the manner provided by the Lands Clauses Consolidation Act "for determining questions of compensation with regard to lands "purchased or taken under the provisions thereof." I may, in passing, remark, that the mode of ascertaining the amount of compensation in Ireland is, by reference to an arbitrator appointed by the Commissioners of Public Works in Ireland.—[14 & 15 *Vic.*, c. 70, s. 5].—In my opinion, that is the proper and only remedy for the injury complained of in this case. The subsequent sections of the Act (8 & 9 *Vic.*, c. 20), especially sections 53, 54 & 55, show that no road, whether public or private, but such as is acted upon by being crossed, cut through, sunk or used by the Company, is provided for by these sections. The injury here is merely consequential upon the manner the Company have used the public road, by which they have injuriously affected the plaintiff's land; but not by an injury to his private road itself, or any

use made of it by the Company. We, therefore, think that, although the plaintiff is entitled to compensation for the injury done to his premises, by being deprived of the facility of access to the public road, which he had theretofore enjoyed, and the other inconveniences he suffered, he cannot obtain redress by this action, and the verdict must be set aside, and a nonsuit entered for the defendants.

M. T. 1858.
Queen's Bench
MOORE
v.
GT. S. & W.
RAILWAY.

The same question was raised upon demurrer, in this case, which was argued last Term before my Brothers PERRIN and O'BRIEN; but as my Brother CRAMPTON and myself were not present at that argument, we take no part in the judgment on the demurrer.

Verdict for the plaintiff set aside, and a nonsuit entered.—
Leave to appeal granted.

O'BRIEN, J.

Upon the demurrer, the same question arises for decision which has just been decided; but I think that the second count of the summons and plaint raises the point even more strongly against the plaintiff: because it appears upon that count that the damage complained of is, that the plaintiff's private way was taken from him; and that is not a damage contemplated by the sections of the Railway Clauses Consolidation Act 1854.

It is not necessary for me to go into the case again, after the judgment which has just been pronounced by my LORD CHIEF JUSTICE. My Brother PERRIN and myself are of opinion that the demurrer must be overruled.

Demurrer overruled.

Exchequer Chamber.

E. T. 1859.
T. T. 1859.
Esch. Cham.
May 4, 7, 28.

THE plaintiff having appealed, pursuant to the Common Law Procedure Act 1856, s. 41, from the order of the Court of Queen's Bench, directing that the verdict for the plaintiff should be set

T. T. 1859. *aside*, and a nonsuit entered, the case now came on to be heard before the Court of Exchequer Chamber.*

Exch. Cham.

MOORE

v.

GT. S. & W.
RAILWAY.

D. C. Heron and *C. Pallas*, for the appellant (the plaintiff below).

G. Fitzgibbon and *Jellett*, for the respondents (the defendants below).

D. C. Heron replied.

Cur. ad. vult.

FITZGERALD, B.

May 28.

This case comes before the Court on the plaintiff's appeal from an order of the Court of Queen's Bench, of the 24th of November 1858, which made absolute a previous order of the 5th of the same month, and directed that the verdict had for the plaintiff, at the Sittings after last Trinity Term, before the LORD CHIEF JUSTICE, should be set aside, and that a nonsuit should be entered. The conditional order purports to have been made on the application of the defendant, pursuant to liberty reserved by the LORD CHIEF JUSTICE at the trial, on the ground that the action did not lie.

In consequence of some matters which occurred during the argument of the case in this Court, we have applied for and been favoured with my LORD CHIEF JUSTICE's note of the leave reserved at the trial. It is in these words:—"Two questions to be reserved for the Court. If the plaintiff has made a case for damages? and, if so, whether he is entitled to recover them in this action, or only through the arbitrator? This arrangement by consent of both sides. The jury, on the supposition that the plaintiff should be entitled, find £50." By the "arbitrator" in this note is meant an arbitrator appointed under the provisions of the Irish Lands Clauses Consolidation Act of the 14 & 15 of *The Queen*. On the discussion of these questions, the Court of Queen's Bench directed the verdict

* *Coram* MONAHAN, C. J., PIGOT, C. B., KEOGH and CHRISTIAN, JJ., RICHARDS, GREENE and FITZGERALD, BB.

NOTE.—The question stated for the Court was, whether the plaintiff was entitled to have the verdict entered for him for £50, the amount of damages found by the jury; or, whether the defendants were entitled to have a nonsuit entered, pursuant to the leave reserved?

for the plaintiff to be set aside, and a nonsuit to be entered; and this Court has now to determine whether that be the order which the Court of Queen's Bench ought, under the circumstances, to have made; and, if not, what order ought to have been made by the Court of Queen's Bench.

T. T. 1859.
Esch. Cham.
MOORE
v.
GT. S. & W.
RAILWAY.

The *plaint* contains six paragraphs. By the first paragraph, the plaintiff complains that the Company, on the 17th of September 1857, cut through, sunk and used a public road, leading from Shinrone to the mail-coach road therein described. That they thereby rendered that public road impassable for, dangerous and extraordinarily inconvenient to passengers, and to the plaintiff, being one of the persons entitled to the use of it, in the manner after-mentioned. That the Company did not, before the commencement of these operations, cause a sufficient road to be made, instead of the road so interfered with, and did not maintain such substituted road in a state as convenient for passengers as the road so interfered with. The allegations of the *plaint*, so far, have a manifest reference to certain provisions of the Railways Clauses Consolidation Act 1845; but this paragraph of the *plaint* nowhere alleges that the operations of the Company stated were done in the exercise of any powers given by that Act, or any other lawful powers. This paragraph then alleges, that the plaintiff, at the time of committing these grievances, and thence hitherto, has been, and still is, possessed of a messuage and premises adjoining the said public road, and *by reason thereof* ought, during all that time, to have had, and still to have, a right of way over the public road so interfered with, *i. e.*, a way from and out of the said public road into his said messuage and premises, and from and out of his said messuage and premises into and over the said public road, to go, return, pass and re-pass at all times. It then proceeds to allege that the plaintiff has suffered special damage, by reason of the defendants having made the *said way* broken and impassable, by digging across the same, and by sinking it and the public way some feet, and have not caused another sufficient road to be made before they interfered with the public road, and have not yet caused any sufficient road to be made; whereby the said way has been made

T. T. 1859.
Exch. Cham.
MOORE
v.
GT. S. & W.
RAILWAY.

dangerous, and extraordinarily inconvenient to the plaintiff, his family and servants; the plaintiff has been unable to bring turf and manure to his house and yard respectively, and has been deprived of his previous mode of access to his messuage and premises.

The plaintiff's messuage and premises, it will be observed, are stated to adjoin the public road interfered with by the defendants. The right of way said to be enjoyed by the plaintiff, in virtue of his ownership of those premises, is the right of passing or stepping from them on the public road, and back again. The peculiar injury alleged to the plaintiff, as distinguished from other passengers along the public road, as a thorough passage between Shinrone and this mail-coach road, is the interruption of the mode of access to his own premises at that particular point of the road, and the loss thereby accruing, and there not having been made by the defendants any sufficient road, either before this interference or after. What is meant by "a sufficient road" in this paragraph is not very clear. The only substantial difference between this paragraph and the second paragraph of the plaint is that, in the second paragraph, the defendants' interference with the public road is alleged to have been made in exercise of the powers granted by the Railways Clauses Consolidation Act 1845, and other statutable powers. In stating the peculiar or special damage, the plaintiff's *way* is said to be destroyed; to have been *left* broken and impassable by the defendants, who did not make *any sufficient road* before they interfered with the public road; and items of inconvenience, additional, arising from the destruction of the plaintiff's mode of access, are stated.

The third paragraph of the plaint omits the introductory allegations of interference with the public road, and of the default in not having previously made a sufficient road instead of it. It commences with the statement of the plaintiff's possession of a house and premises adjoining the public road, and *his right of way by virtue thereof*, to and from the public road, from and to those premises. It then proceeds to allege that the defendants have sunk the public road, and thereby rendered the plaintiff's *way* impassable and

dangerous, and have not made *any sufficient road, whereby the plaintiff could have access to his premises*. The peculiar or special damage alleged is, that the plaintiff's way has been *left* broken and impassable; the deprivation of his previous mode of access, and certain inconveniences thence arising, which are specified. The "sufficient road" in this paragraph would seem to mean a sufficient mode of access to the plaintiff's premises. But all these paragraphs of the *plaint* agree in this; that the *gravamen* of the charge against the defendants is, the interruption or destruction of the plaintiff's access to his premises from the public road, that mode of access being described as "*a way*," belonging to the plaintiff, in virtue of his possession of those premises. This interruption is in all alleged to have been occasioned by the defendants' operations on the public road; the second paragraph alone stating those operations to have been done in the exercise of lawful power.

The three other paragraphs of the *plaint* allege breaking and entry of the plaintiff's close by the defendants, in different forms.

To the first paragraph of the *plaint*, the defendants pleaded three defences. By the first defence, they denied that they had rendered the public road dangerous and inconvenient to passengers. By the second, they denied that the plaintiff had suffered any special damage. By the third, they aver that the alleged *way* of the plaintiff is nothing but this:—his premises abutted on the public road, which was on a level with them; he had access to them over the public road; and then they allege that they, in exercise of their statutable powers, lowered the public road, on which the plaintiff's premises so abutted; and they insist that, if the plaintiff's premises have been injuriously affected thereby, he ought to have pursued the remedy given by the Railway Acts, and has no right to institute an action at Law for that injury. There are three similar defences to the second paragraph, which is the only one alleging the defendants' acts to have been done in exercise of statutable powers; and, of these defences, that which relies on the legal powers of the defendants has been demurred to by the plaintiff.

To the third paragraph of the *plaint*, the defendants, by one

T. T. 1859.
Esch. Cham.
 MOORE
 v.
 GT. S. & W.
 RAILWAY.

T. T. 1859. *Esch. Cham.* defence, rely as before, that their acts interfering with the public road were done in exercise of statutable powers, and insist that injury to the plaintiff's premises is not the subject of an action at Law. By a second defence they deny special damage. By a third defence they allege that they did make, as in that defence specified, a sufficient road, giving the plaintiff access to his messuage and premises.

**MOORE
v.
ST. S. & W.
RAILWAY.**

To the fourth, fifth and sixth paragraphs of the plaintiff's defence, the defendants put in defences denying the trespass therein alleged respectively, and a further defence, averring that the alleged trespasses were done in exercise of their statutable powers. There was a common issue settled on the first and second paragraphs, viz, whether the public road was rendered dangerous and impassable, as alleged? on the first, second and third, whether the plaintiff had sustained special damage as alleged? on the first, whether the third defence thereto, relying on statutable powers, was true in substance and fact? on the third, whether the defendants' interference with the public road was in exercise of statutable powers, and also, whether the third defence to the third paragraph, which alleged the providing of a sufficient mode of access to the plaintiff's premises, was true in substance and fact? On the three last paragraphs the issues are on the commission of the trespass alleged, and whether the defence relying on statutable powers is true in substance and fact? The substantial issue on the first three paragraphs was, whether the injury to the plaintiff, in respect of his premises, had so arisen from authorised acts of the defendants as to be the proper subject of a special statutable remedy, and not of an action at Law? The substantial issue on the three last paragraphs was, whether the trespasses were in fact committed?

At the trial, the plaintiff, on his own behalf, proved that he was possessed of a house and premises adjoining the public road, as tenant from year to year; that, previous to the interference of the defendants with the public road, those premises were on a level with the road, from which there was a free access to the premises at all times; that he made his livelihood by using the public road, and this mode of access from it to his premises, in the manner which he described. He showed that the sinking of the public road had

interrupted his mode of access, and he gave evidence that the loss occasioned was in respect of one of his modes of using the road, and his access, £36; as to another, £3, as to another, £6, and his total loss he estimated at £50. He gave no evidence, that I can find, of the thorough way of the public road having been rendered impassable or dangerous to passengers. He did say that the public road was rendered so inconvenient to him that, while the Company was carrying on operations, he was unable to draw anything with his donkey, and that when the cutting was completed he was obliged to have his ass and cart lifted from the public road to his yard. I do not understand this as meaning that he was unable to draw anything *along the public road*, but that he was unable to draw anything from the public road to his premises. But the plaintiff undoubtedly gave evidence that, during the operations of the Company, they drove horses and cars over his premises, destroyed his fences, and took portions of his soil. Of this evidence, the only part applicable to the three first paragraphs of the plaint and the issues thereon was that of the interruption, by the Company's operations, of the plaintiff's mode of access to his premises, viz., that described in the plaint as a way from the road to his premises, belonging to him in virtue of his possession of those premises.

The only evidence which would appear to have been given on the part of the defendants seems to be applicable to the third defence to the third paragraph of the plaint; i. e., to a substituted mode of access to the plaintiff's premises.

The Company gave evidence that the plaintiff offered a strip of his land in order to enable them to make a slope from his premises to the public road as altered, provided the Company would pay him £1. 10s., but that he refused to allow them to make the slope on his land unless that sum was paid. It is obvious that, at the trial, the question on the three first paragraphs at least was, whether the interruption of the plaintiff's access to his premises was an injury on which an action could be sustained at all, as a private injury? and if so, whether it so resulted from the lawful acts of the defendants as to be the subject of an action at Law, or only of the remedy provided by the Railway Acts? Supposing the plaint to have consisted of the three first paragraphs, this would render perfectly

T. T. 1859.
Esch. Cham.
 MOORE
 v.
 GR. S. & W.
 RAILWAY.

T. T. 1859.
Exch. Cham.

MOORE
v.

GT. S. & W.
RAILWAY.

intelligible the reservation of the points at the trial. If I were at liberty to conjecture, I should say it was reasonably clear that both parties concurred in considering the action as founded on the three first paragraphs only; but I am sorry to say that, neither the case nor the manner in which the points have been saved enable me, in my opinion, legally to act on this conjecture. I am, therefore, obliged to separate the three first paragraphs of the plaint from the others and to consider how the matter stands on the two sets of paragraphs independently.

In opening the case here, the leading Counsel for the plaintiff, in entire conformity with the conditional order and the points reserved, argued, and very ably argued, two matters applying wholly to the three first paragraphs of the plaint. He insisted, first, that the injury alleged and proved, viz., the interruption of the plaintiff's access to his premises, arising from the operations of the defendants on the public road, was a particular injury, which would, at Common Law, have warranted an action at the individual suit of the plaintiff, though the defendants' operations were a public nuisance; secondly, that this action was reserved by the Railways Clauses Consolidation Act. This argument assumes that the operations of the defendants were done in exercise of their statutable powers; and I feel no hesitation in saying that, both the reservation of the points by my LORD CHIEF JUSTICE, and the form of the conditional order, show that there was a perfect mutual understanding between the parties, that the operation of sinking the public road by the defendants was done in exercise of their statutable powers. However, the Counsel who followed on the part of the plaintiff insisted that the Company had offered no proof that the acts were done in exercise of statutable powers, and that, consequently, they stood in the position of mere wrong-doers; which would make the only question to be, whether, at Common Law, an action could be sustained by the plaintiff individually? I feel no difficulty in saying that this point was not open to the plaintiff. But then it was further insisted that, at all events, there was evidence of a trespass, in breaking and entering the plaintiff's close, wholly unjustified by any evidence on the part of the defendants, and that, consequently,

no nonsuit could be entered. It is this latter contention that renders necessary the separation of the two sets of paragraphs.

T. T. 1859.
Esch. Cham.

MOORE

v.

GT. S. & W.
RAILWAY.

With reference to the three first paragraphs, Mr. *Heron* argued, that the dealing with a public road, so as to render the premises of a person residing on the line of road, and having access from it to his premises, inaccessible, would be a particular injury to that individual, for which an action on the case would lie at Common Law, though the interference with the road was a public nuisance. It does appear to me that an injury of this nature is stated by the three first paragraphs of the plaint, and that abundant evidence in support of it was given by the plaintiff. It is sufficient to add that I think Mr. *Heron* sustained by authority his position that, for an injury of that kind, an action at Law would lie at the suit of an individual. He established, therefore, in my opinion, as to one of the points reserved, a Common Law cause of action, that is, a particular injury arising out of a public nuisance. But the authorities on which he relied were plainly founded on this, that the particular injury was the direct and necessary consequence of the public nuisance. What remained to do was, to show that if the interference with the public road was sanctioned by the Railway Acts, this Common Law right of action was preserved by those statutes. For this purpose Mr. *Heron* relied on the 6th and 55th sections of the Railways Clauses Consolidation Act 1845; and in that contention, he has, I think, failed. By the 6th section of that Act it is provided:—"That in exercising the power given to the Company by "the Special Act to construct the Railway, and to take lands for "that purpose, the Company shall be subject to the provisions and "restrictions contained in this Act and in the said Lands Clauses "Consolidation Act; and the Company shall make to the owners "and occupiers of, and all other persons interested in, any lands "taken or used for the purposes of the Railway, or *injuriously* "affected by the construction thereof, full compensation for the "value of the lands so taken or used, and for all damage sustained "by such owners, occupiers and other parties, by reason of the exercise, "as regards such lands, of the powers by this or the Special Act, "or any Act incorporated therewith, vested in the Company; and,

- T. T. 1859. *“except where otherwise provided by this or the Special Act, the*
Esch. Cham. *“amount of such compensation shall be ascertained and determined*
MOORE *“in the manner provided by the said Lands Clauses Consolidation*
v. *“Act, for determining questions of compensation with regard to*
OT. S. & W. *“lands purchased or taken under the provisions thereof; and all*
RAILWAY. *“the provisions of the said last mentioned Act shall be applicable*
“to determining the amount of any such compensation, and to
“enforcing the payment or other satisfaction thereof.”

This section ousts the remedy at Common Law for compensation in damages to the occupier of premises injuriously affected by the construction of the Railway, except where otherwise provided by the Act, and throws on the plaintiff the *onus* of showing that the injury alleged, which is an injury to the plaintiff by reason of the possession of lands, is an injury as to which the Common Law right of action is specially reserved by the statute.

By the 16th section it is provided that “It shall be lawful for “the Company, for the purpose of constructing the Railway, to” (amongst other things) “alter, as well temporarily as permanently, “the course of any such rivers or streams of water, *roads, streets or “ways, or raise or sink the level of any such rivers or streams, “roads, streets or ways, in order the more conveniently to carry “the same over or under or by the side of the Railway, as they “may think proper, . . . provided always, that in the exercise “of the powers by this or the Special Act granted, the Company “shall do as little damage as can be, and shall make full satisfaction “in manner herein, and in the Special Act, and any Act incorporated “therewith, provided, to all parties interested, for all damages by “them sustained, by reason of the exercise of such powers.”*

The special remedy provided by the Lands Clauses Consolidation Act, as modified by the Irish statute of the 14 & 15 of *The Queen*, is an inquiry before an arbitrator. By the 53rd section:—“If, in “the exercise of the powers by this or the Special Act granted, it “shall be found necessary to cross, cut through, raise, *sink or use “any part of any road, whether carriage-road, horse-road, tram- “road or railway, either public or private, so as to render it “impassable for, or dangerous or extraordinarily inconvenient so,*

“*passengers or carriages, or to the persons entitled to the use thereof, the Company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be.*”

T. T. 1859.
Exch. Cham.

MOORE
v.

GT. S. & W.
RAILWAY.

I have myself no doubt that, in the construction of this section, the words “passengers and carriages” on the one side, and “persons entitled to the use thereof” on the other, are to be read distributively, and refer, the former to public, and the latter to private roads; and that the impassableness, danger and inconvenience to be guarded against is, the inconvenience of the interruption of such roads as a thorough passage to those using them as such, and not an injury to every person having incidentally a right to use the [thorough way for any purpose whatever; but it is indifferent whether the words are or are not read according to that distributive construction, because the sense is fixed by the description of the substituted road to be provided by the Company in either case, viz., “*one as convenient for passengers and carriages,*” that is, one answering as a thorough way equally conveniently, but not necessarily answering each and every other purpose of convenience to which the road interfered with may have been made subservient.

By the 54th section:—“*If the Company do not cause another sufficient road to be so made before they interfere with any such existing road as aforesaid, they shall forfeit £20 for every day during which such substituted road shall not be made, after the existing road shall have been interrupted; and such penalty shall be paid to the trustees, commissioners, surveyor or other person having the management of such road, if a public road, and shall be applied for the purposes thereof, or, in case of a private road, the same shall be paid to the owner thereof; and every such penalty shall be recoverable, with costs, by action in any of the Superior Courts.*”

It is obvious that the gravamen of the injury for which this redress is given is the default of the Company in not providing the substituted road mentioned in the previous section; that is, as I

T. T. 1859.
Exch. Cham.

MOORE
v.

GT. S. & W.
RAILWAY.

have shown, a road equally convenient as a thorough way for passengers along it; and the section itself renders more clear the nature of the substituted road, by the persons to whom it gives the penalties and the actions, viz., those who, in the case of each, represent the right of passage over the respective ways, public or private.

By the 56th section:—"If any party *entitled to a right of way over any road so interfered with* by the Company shall suffer *any special damage, by reason that the Company shall fail to cause another sufficient road to be made before they interfere with the existing road*, it shall be lawful for such party to recover the amount of such special damage from the Company, with costs, by action on the case in any of the Superior Courts, *and that whether any party shall have sued for such penalty as aforesaid or not, and without prejudice to the right of any party to sue for the same.*"

This is the section relied on by the plaintiff as preserving to him his Common Law right of action for special damage; but it is obvious that the gravamen of the injury for which this action is given is, again, the failure of the Company to make the substituted road spoken of in the previous sections, that is, one equally convenient as a thorough passage, and not one answering all the incidental purposes of the previous road. The injury is a special damage to the party as passenger, arising from the want of a thorough way not provided by the default of the Company; but the injury complained of here is not an injury to the plaintiff, *qua* passenger thorough the road; it does not arise directly from the want of the substituted thorough road, but does arise directly from the authorized act of the Company, viz., sinking the level of the old road, there being no evidence whatever here that the old road was at all rendered impassable or dangerous, or inconvenient to passengers in general, or to the plaintiff in particular as a passenger. I may observe, that the saving of the concurrent right to the penalty shows more clearly the nature of the injury designed by the section, viz., an injury common to the party, with the other passengers on the road, but rendered his in particular by the special loss.

A reference to the next section, the 56th, would only put the

matter in a clearer light; and, in truth, independently of the plain language of the sections, express authority was referred to by the defendants' Counsel for the position that, when the injury arising from the interference of a Railway Company with a road is an interruption of a party's access to his lands, the Common Law remedy is ousted, and his redress must be under the special provisions of the Railway Acts.

T. T. 1859.
Esch. Chem.
 MOORE
 v.
 GT. S. & W.
 RAILWAY.

I am, therefore, clearly of opinion that the Common Law right of action for the matters alleged in the three first paragraphs of the plaint is ousted by the statute, and, if these were the only paragraphs of the plaint, that the direction of a nonsuit would have been the proper order to be made.

My strong opinion is, that the understanding of the parties, and of the Judge at the trial, was, that this was the only question to be discussed on the points reserved. But I am bound to say that there does not appear to me to be anything now before the Court which would legally warrant it in dealing with the case on this footing, and that I must consider the question before us as being, whether *any* subsisting Common Law right of action, in respect of which evidence was given, has been shown in the plaintiff? I think there was, in respect of the breaking and entry of his close; and, therefore, I think the only course open to the Court is to direct a new trial, for the purpose of leaving that evidence to the jury, and ascertaining the damages, if any, arising from that trespass. It is obvious that, of the £50 assessed generally by the jury, the greater part, if not all, was given in respect of the supposed injury mentioned in the three first paragraphs.

CHRISTIAN, J.

My Brother FITZGERALD has taken precisely the same view which occurred to my mind, and he has also stated the very same arguments which had occurred to myself, and based upon the same principles. I need only add that I concur in his judgment.

KEOGH, J., concurred.

T. T. 1859.
Exch. Chanc.

MOORE
 v.

OT. S. & W.
 RAILWAY.

GREENE, B. (after the stating the first three counts of the plea) proceeded as follows:—

The question is, whether, upon the evidence, the plaintiff's case is thus far sustained, founded as it is upon the 55th section of the Railway Clauses Consolidation Act 1845? This depends upon the question to what cases that section was meant to apply. The 6th and 16th sections regulate the general powers of the Company, as also the general nature of the compensation which they are to make to persons injured by the exercise of those powers. The 55th section provides generally that the Company shall make "a compensation" to the owners and occupiers of, and all persons interested in, any lands taken or used for the purposes of a Railway, or *injuriously affected by the construction thereof*; and that compensation is, except in cases otherwise provided for by that Act, to be ascertained in a certain way, viz., by arbitration. It is impossible, I think, to say that the facts stated in the plaintiff's plea, if substantiated, do not show that the plaintiff's premises were *injuriously affected by the construction of the Railway*. The case would, therefore, be one for compensation by arbitration, unless it can be shown that another remedy is provided for it in the Act. That other remedy, it is said, is here provided by section 55. What then is the class of cases to which that section applies? Clearly, in my opinion, only to those of special damage by reason of the Company's having failed to cause a sufficient road to be made before interfering with an existing road, by way of substitution for such pre-existing road; that is, where, under the 53rd section, it would be obligatory on the Company, before commencing any work upon a road, public or private, likely to render it dangerous or extraordinarily inconvenient to passengers or carriages, or to persons entitled to use it, to provide another road for temporary use, during the progress of their works. The duty imposed on the Company attaches *before the existing road is at all interfered with*; for the neglect of this duty, provided special damage accrues from such neglect, an action lies; and, under the 54th section, the Company is made liable, in case of similar default, to a penalty of so much *per diem*, to be paid to the party injured. Now the point for our decision

whether the evidence given at the trial disclosed such a case as contemplated by the 53rd, 54th and 55th sections of the Act? It appears to me that that evidence went to establish a case, not of such a temporary or occasional damage as those sections provide for, but one of permanent, lasting and perpetual injury to the plaintiff's property. It does not appear that any substituted road was called for or required. If this had been an action for penalties under the 54th section, I do not see how it could have been maintained. The plaintiff himself states that a new road might have been made for him; that is, as I understand, not a temporary substituted road to be used whilst the works are in progress, but to be used for ever, not *in lieu* of the old road, but *as a passage to* the old road. He also stated that the road was dangerous, *not in the use of it by a person upon it*, but to a person attempting to get on it from the plaintiff's premises, as in the instance of the plaintiff's child; and his case was, *that after the cutting was completed*, he was obliged to lift his ass and cart from the road to his land. It is impossible, in my mind, to say that this is a temporary or occasional damage, arising from neglect to provide a way *during the progress of the works*. The engineer examined by the plaintiff stated the injury and neglect to be, that the Company had not substituted a road for the plaintiff *instead of his previous mode of access to his house*. Had the case, therefore, rested here, I should have had no doubt that there ought to be a nonsuit or a verdict for the defendants. There are, however, in the plaint, counts in trespass. The only part of the evidence relied on to sustain this cause of action is a statement by the plaintiff that the Company drove horses and carts from the mouth of the cutting across his garden, and took some of the soil, which fell into the excavation. The defence of the Company to the charge of *trespass* is, that the alleged trespasses were the consequences of acts done by them in the due exercise of the powers conferred upon them by their Act of Parliament. Now, as to the Company taking earth which fell into the excavation, I cannot conceive that this can be otherwise than a necessary result of making the cutting at all, and of course that it arose from a due execution of the powers of the Act. But as to driving across the plaintiff's garden, I cannot say

T. T. 1859.

Esch. Cham.

MOORE

v.

GT. S. & W.

RAILWAY.

T. T. 1859.
Exch. Cham.

MOORE
v.

GT. S. & W.
RAILWAY.

that that was necessarily involved in the due execution of the statutable powers; and, although I have no doubt that not a farthing of the damages assessed was awarded in reference to a merely technical trespass, yet, unfortunately, on the record before us, I cannot judicially say that some portion of it may not have been referrible to the trespass counts. Had separate damages been awarded, there would have been no difficulty in reducing the amount by sustaining the verdict to the extent of the separate damages awarded for the trespass.* But that not being so, I am reluctantly driven to the alternative of either reversing the judgment generally, or of awarding a *venire de novo* for the purpose of severing the damages; and, as I cannot adopt the former part of the alternative, I see no other way of arriving at the justice of the case than by ordering a new trial.

RICHARDS, B., concurred.

PIGOT, C. B.

I am unfortunately compelled to differ, in my judgment, from my learned Brethren who have preceded me. The construction which I give to this Act (a) appears to me to be in conformity with the principles of decision in the cases of *Watkins v. The Great Northern Railway Company* (b), and *The Attorney-General v. The London and South Western Railway Company* (c); *The Attorney-General v. The Great Northern Railway Company* (d); *Regina v. Scott* (e). The decision in *Tanner v. The South Western Railway Company* (f) has no application. There the direct declared intention of the Company's Special Act was, to turn the tramway, the interference with which was complained of, into a railway, which the Special Act expressly substituted "in lieu thereof." Three modes are pointed out by the statute in question, for redressing injuries occasioned by the execution of the works of a Railway.

(a) 8 & 9 Vic., c. 20.

(b) 16 Q. B. 961.

(c) 3 De G. & S. 439.

(d) 4 De G. & S. 75.

(e) 3 Rail. Cas. 187.

(f) 5 El. & Bl. 618.

* Com. Law Proc. Act 1856, s. 47.

The first mode of redress is comprised in the series of provisions commencing with the 6th section, by which the Company is empowered, in the construction of a Railway, to take lands; and, by the 16th section, to interfere with several descriptions of property, making compensation for the injury thus occasioned, "to all parties interested in the lands taken for the purposes of the Railway, "or injuriously affected by the construction thereof" (a), in the manner pointed out by the Legislature, which, in Ireland, is by arbitration (b). These sections, however, are controlled by the special clauses of the Act, which comprise two other distinct sets of provisions. The first of these prescribes the second mode of redress given by the Act, which is comprised in the series of sections commencing with the 46th section. By these the Company is empowered to interfere with public or private roads; but in such case provision is made, not only for compensation to the individual (c), but also for the restoration, *in specie*, of the road so interfered with, if that be compatible with the formation and use of the Railway; and if not, then the substitution of a new road, as convenient as the former, or as near thereto as circumstances will allow (d). The third mode of redress is comprised in the sections commencing with the 68th, which provides for accommodation works, irrespective of roads interfered with. The question is simply whether the present case is within the first or second class of these provisions? First, it is clearly not within the third; if it be within the first, the plaintiff cannot maintain his action (e); but if it is a case of special damage, within the second class of provisions, or, to speak more precisely, within the 55th section, then the plaintiff is entitled to succeed. The section on which the plaintiff relies, as defining his rights, is the 53rd. That on which he relies as giving his remedy is the 55th. The 53rd section is as follows:—[His Lordship here read the 53rd section].—If the road is to be so interfered with as to become "*extraordinarily inconvenient*," not only to passengers or carriages,

T. T. 1859.
Esch. Cham.
 MOORE
 v.
 GT. S. & W.
 RAILWAY.

(a) Sec. 6.

(b) 14 & 15 Vic., c. 70.

(c) Sec. 55.

(d) Secs. 53. 56.

(e) *Watkins v. Great Northern Railway Company*, *supra*.

T. T. 1859.

Each Chan

MOORE

v.

OT. A. & W.

RAILWAY.

but also "to persons entitled to the use thereof," the Company to make and maintain a substituted road, as convenient for passengers and carriages as the road interfered with, or as near thereto as may be. If we are to construe that section strictly alone, what is the plain meaning of its terms? Is it not that a substituted road is to be as convenient to all persons using the section as was the former road? If so, the consequence of the Company's interference with an existing road, so as to make it extraordinarily inconvenient, is an obligation on the Company created by the Legislature, that the Company shall, "at their own expense," construct and maintain a substituted road, "as convenient or as nearly as may be," as the former road was, for passengers or "persons entitled to the use" of the former road; that is not only for passengers and carriages passing along the road from one place to another, but also for "persons entitled to the use of the road, and, among these, for persons dwelling at the roadside." It is impossible, in construing this section, to expunge the words "or to the persons entitled to the use thereof." To give the section any other construction than that which I have stated would appear to me to impute to the Legislature nothing short of a palpable absurdity. A Railway may be constructed so as to cross a road traversing the suburb of a town or other thickly inhabited locality. It may be necessary that the Railway should cross such a road, under or over a bridge. It may be necessary, for the purposes of the Railway, that the ground traversed by the road should be sunk twenty feet in depth (in the present case the road was sunk so deep that the plaintiff's donkey and cart must be lifted from the road to the plaintiff's yard); and the argument gravely addressed to us was, that any person inhabiting the road-side and using the road by going upon it from his dwelling, whether for traffic or other purposes, cannot be considered as having sustained special damage, although the road is thus made extraordinarily inconvenient to him; that, if the donkey of a person who is merely a passenger along the road be impeded for a moment in his passage over the road, such passenger is entitled to maintain an action, but that if the road is so interfered with that a road-side inhabitant is precluded, except with great difficulty, from becoming a passenger along the road, either because

he cannot, without such difficulty, descend to it, in consequence of its being sunk too low, or ascend from it, in consequence of its being raised too high, he cannot maintain an action for special damage as a person who, before the change was made by the Company in the road, was "*entitled to the use thereof*." I confess that, to my understanding, that proposition involves an absurdity so great, that I cannot bring my mind so to construe the 53rd section as to impute that absurdity to the Legislature; especially where, by so doing, I should give to very plain words an import narrower than their natural and obvious meaning, to which there is nothing in any part of the statute in the least degree opposed. The next section is the 54th.—[His Lordship here read the 54th section].—This section subjects the Company to a penalty only, for not making a sufficient substituted road, to be recovered by the persons having the care of the road, if it be a public road, or by the owner of the road, if it be a private road. It is not conversant with the case of special damage sustained by an individual. That is provided for in the 55th section.—[His Lordship here read the 55th section].—The previous section gives the penalty, in the case of public roads, to the persons having the management of them, and, in the case of private roads, to the owners. It is plain that, in the case of a public road, the persons entitled to sue for the penalty might never have sustained any special damage from the failure to supply a proper road; and it is equally plain that persons might sustain very considerable special damage, who never could be indemnified by means of a penalty recoverable by the trustees, or other managers of the public road. Accordingly, the 55th section, in words of universal application, provides that, "If *any party* entitled to a right of way over *any road* so interfered with by the Company shall suffer any special damage, &c., it shall be lawful for *such party* to recover the amount of such special damage from the Company, with costs, by action on the case." I do not think it can be successfully contended that the universality of the terms of the 55th section are to be controlled by the limited terms of the 54th section, and that it is only the persons entitled to sue for the penalty, under the 54th section, who are competent to sue for special damage

T. T. 1859.

Esch. Cham.

MOORE

v.

GT. S. & W.
RAILWAY.

T. T. 1859.

Lock, Chem.

MOORE

v.

Gt. S. & W.
RAILWAY.

under the 55th section. The Legislature are dealing public and private. The owner of a private road, ~~road~~ his own property, may give, to any number of persons "right of way over" such road. Every individual of the "right of way over" a public road which is a highway. of the private road, though he can sue for the penalty. ~~may~~ a great distance, may never personally use it, and, then not suffer special damage, although such special damage may be suffered by a number of persons, each of whom has from the owner a right of way over the road. Again, the ~~the~~, of a public road, are merely guardians of the road. They never go upon it in their lives. If they recover the penalty, so as trustees for the public, and as a matter perfectly distinct from *special damage*, the right to recover which is given to individuals sustaining a personal inconvenience, and thus specially injured in their right to use the road. The words, therefore, "any party entitled to a right of way over any road so interfered with," which are universal in their primary and obvious meaning, appear to me to have been used by the Legislature for the purpose of superadding penalties (given to the trustees of public and owners of private roads, in order to compel the Company, by a daily pecuniary penalty as the punishment of default, to perform the statutable duty) and further indemnity for those entitled to use a road, of either (public or private), by enabling them to recover, in an action of case, special reparation for special damage.

In this case it appears to me that compensation for the subject-matter of the present complaint could not have been obtained by the plaintiff under the provisions of the 6th section or under the statutory provisions of the Railway Act (Ireland) 1851 (14 & 15 c. 70), because the injury complained of, and proved, arose from personal inconvenience to the party who brings the action, could not be included in the compensation for the value of the injuriously affected by the sinking of the road. It appears to me that the injury sustained by the plaintiff, in the present case, is precisely within the principle laid down by the Court of Queen's Bench in England, in *Watkins v. The Great Northern Railway*.

Company (a), as special damage to an individual, *ultra* the damage to the land.*

T. T. 1859.
Exch. Cham.

MOORE

v.

GT. S. & W.
RAILWAY.

MONAHAN, C. J.

My Brother FITZGERALD has gone so fully into the pleadings and evidence in the case, that it is unnecessary for me to do so, concurring as I do in the judgments delivered by him and the majority of the Court. The special damage of which the plaintiff complains is that, in the progress of making the Railway, a certain high road, from one town to another, to which all her Majesty's subjects had a right of access, has been permanently lowered ten feet, the result of which is, that the plaintiff's house has been left at that height above the road; and the particular injury complained of is, that the plaintiff has been deprived of his previous mode of access to his house and premises, and is unable to bring turf or manure to his premises; that the road has been rendered dangerous to his family, and that he has been obliged to lift his ass and cart, with the assistance of his neighbours, from the road to his yard. It has not been contended by the defendants that the plaintiff is not entitled to compensation for the deterioration in value which his premises have so sustained; but the defendants contend that the plaintiff's remedy is by compensation to be awarded by the arbitrator, and that such an action as the present is not maintainable. It seems to me to be perfectly plain that, under the earlier sections of the Act (b), the plaintiff is enabled to obtain compensation, by the award of the arbitrator, for the permanent injury which his house or property has sustained, by reason of its being rendered more inconvenient to him than it was previously: but the question is whether, in addition to this, he can sustain this action for special damage? It being

(a) 16 Q. B. 961.

(b) 8 & 9 Vic., c. 20, ss. 6, 16; 14 & 15 Vic., c. 70.

* NOTE.—See *North Staffordshire Railway Company v. Dale* (8 El. & Bl. 836), as to the obligation of a Railway Company, where a road is raised and a bridge constructed, for the purpose of enabling the Company to carry the Railway under it.

T. T. 1869.

Esch. Cham.

MOORE

v.

GT. S. & W.

RAILWAY.

conceded that the road has been lowered, pursuant to the provision of the statute, and that, however injurious it may be to the plaintiff, he cannot sustain an action like the present, unless the statute authorises him so to do; the question, therefore, is, can the plaintiff point out a specific section in this Act, under which he can obtain special damage for the injury which he has sustained? The sections relied upon for this purpose are the 53rd, 54th and 55th sections of the Railways Clauses Consolidation Act 1845 (a). —[His Lordship here read the 53rd section].—There is no doubt whatever that, by this section, if the Company are necessitated, in the course of their works, to interfere with a road, either public or private, in such a way, whether by raising or lowering it, as to render it impassable, dangerous or extraordinarily inconvenient to passengers, carriages or persons entitled to use it, the Company must, before so interfering with the existing road, substitute another sufficient road instead; and the 54th section shows what is to be the nature of this substituted road.—[His Lordship here read the 54th section].—Now I ask, can it here be contended for a moment, assuming this substituted road to be a perfectly good and passable road for her Majesty's subjects, that any penalty can be recovered under this section, by the plaintiff, because a bye-road or way to a house at the side of the road has not been provided for him? The 54th section shows what is the duty imposed on the Company by the 53rd section, and what is the injury for which the Railway Company is responsible. The injury is, the making the road substituted for the previous road dangerous or extraordinarily inconvenient to passengers or persons entitled to use it, that is, to use it for passage; and, in that case, the trustees or persons having the management of the road, if a public one, or the owner of the road, if a private one, may recover the penalty. In that section there is nothing in reference to individual right of action, or to individual damage, except in case of a private road. Then comes the 55th section.—[His Lordship here read the 55th section].—By this section, if an individual suffers special damage because a sufficient substituted road has not been made, a cumulative remedy, in addition to the

(a) 8 & 9 Vic., c. 20.

penalty in the 54th section, is conferred on him, by action on the case. But the road for which the Company is so responsible is the same substituted road mentioned in each of the two preceding sections; and this further appears by the next section (a), which provides that, after the Railway works are finished, the original road is, if possible, to be restored, or the road substituted for the original road is to be made a permanent one. If this were not the true construction of these sections, it would be impossible to construct a Railway; because, if there were a number of houses along a road, it is impossible that they should not sustain injury, and then, *de die in diem* and *de anno in annum*, the inhabitants of each of these houses might go on bringing actions against the Company for a continuing injury. I do not think that we ought to give the statute such a construction as that, unless we are coerced to do so. The plaintiff's remedy, for such an injury to his property as the present one, was to have gone before the arbitrator, who would have awarded him full compensation, or if not, the Judge on appeal would have done so. As to the plaintiff's right of action, then, on the special counts, I entertain no doubt; but I regret to find myself unable, from the way in which the record comes before us, finally to dispose of this case, because the damages have been given generally, and not assessed separately upon the special and the trespass counts. It is clear that the injury which the plaintiff principally relied on at the trial was that complained of in the special counts, and for which he claimed special damage; but, though this is so, and we are of opinion he cannot sustain these counts, yet as, in our opinion, there was evidence on the trespass counts, we can only award a new trial. We cannot enter a verdict for £50, because we are of opinion that the plaintiff is not entitled to the whole amount; nor can we enter a verdict for a nominal sum, on the counts for trespass, because we cannot say whether, if the verdict had been under £5, the Judge would have certified for costs; and it is equally clear that the defendants are not entitled to a nonsuit, because there is some evidence to support the trespass counts. We shall, therefore, order a new trial.

Order made for a new trial.

(a) Sec. 56.

T. T. 1859.
Exch. Cham.

MOORE
v.

GT. S. & W.
RAILWAY.

E. T. 1859.
Queen's Bench

THE QUEEN, at the prosecution of JOHN MOLLOY,
v.
 THE JUSTICES OF THE PEACE OF THE COUNTY OF
 DUBLIN.*

(*Queen's Bench.*)

April 16.

Where Magistrates presiding at Petty Sessions refuse to sign the certificate of good character required by the 17 & 18 Vic., c. 89, s. 11, in order to entitle a publican to obtain a renewal of his spirit license, the Court of Queen's Bench cannot issue a mandamus to compel them to do so; notwithstanding that the Petty Sessions order has been reversed on appeal to the Quarter Sessions, pursuant to the 18 & 19 Vic., c. 62, s. 2.

Where a discretion is by statute vested in Magistrates, the Court will not interfere by mandamus to control its exercise.

W. J. SIDNEY, on the 13th of January, obtained a conditional order for a mandamus, directed to the Justices of the Peace for the county of Dublin, presiding at the Petty Sessions of Blanchardstown, commanding them, or two or more of them, to grant to the prosecutor a certificate, in the form and as required by the 17 & 18 Vic., c. 89, entitling him to apply for and obtain a renewal of an Excise license held by him for the sale of spirits by retail. It appeared, from the affidavit of the prosecutor, that he was a publican, who for five years had been licensed to carry on that business. That, on the 27th of September 1858, he applied to Alexander Kirkpatrick and Henry James M'Farlane, two of the Magistrates for the county of Dublin, presiding at the Petty Sessions at Blanchardstown, for a certificate, pursuant to the statute, of his good character, and of the peaceable and orderly manner in which his house had been conducted during the past year. That the said Magistrates refused to grant such certificate, on the ground that his house was not properly conducted during the past year. That an entry of the order of refusal, and of the grounds of it, was duly made in the Petty Sessions Book. That the prosecutor duly appealed to the next Quarter Sessions, and that, upon hearing the appeal, the refusal of said Magistrates to grant such certificate was reversed. That, notwithstanding the order of the Quarter Sessions was forwarded to the said Magistrates, they still declined and

* *Coram* LEFROY, C. J., PERRIN and HAYES, JJ.—O'BRIEN, J., was sitting in the Consolidated Nisi Prius Court.

refused to grant said certificate to the prosecutor. From the affidavits for cause it appeared that, after the reversal of the decision of the Magistrates by the Quarter Sessions, a memorial had been presented by the prosecutor to the authorities, attributing the most improper and corrupt motives to the said Magistrates, and that they declined granting the certificate until the memorial had been considered; that the certificate was refused, in consequence of the prosecutor having, during the year, been fined, for keeping his house open at prohibited hours; and also that a memorial had been presented to the Magistrates, representing the improper manner in which the house had been conducted, and that it was a nuisance in the neighbourhood.

E. T. 1859.
Queen's Bench
 THE QUEEN
 v.
 JUSTICES OF
 CO. DUBLIN.

Macdonogh now showed cause.

The order sought is one not calling upon the Magistrates to hear an application on the part of the prosecutor, but to sign a certificate of good character, so as to entitle him to obtain a renewal of his license.—[LEFROY, C. J. Is there any appellate jurisdiction in this Court, the Act having already given a right of appeal from the decision of the Magistrates to another tribunal?—No. The jurisdiction is conferred upon the Magistrates by the 17 & 18 Vic., c. 89, s. 11, and is, to sign a certificate as to the good character of the person who keeps a public-house, and as to the peaceable and orderly manner in which such house has been conducted in the past year. The 18 & 19 Vic., c. 62, s. 2, is the statute which gives an appeal against the order of the Magistrates refusing to sign such certificate. The 18 & 19 Vic., c. 62, s. 1, requires that the Justices shall cause an entry of the order refusing the application for such certificate to be made in the Petty Sessions book, by the clerk, together with the grounds of refusal, which has been done in this case; and by section 2, upon such appeal, no other ground for refusing such certificate shall be entered upon, except such as shall be stated in such order of refusal. Then, by the latter part of this section, it is provided that, "The license affected by such order shall remain in full force and effect, unless and until such Court of Quarter Sessions shall confirm the said order of refusal;" and, by the 18 & 19

E. T. 1869.
Queen's Bench

THE QUEEN
v.

JUSTICES OF
CO. DUBLIN.

Vic., c. 89, s. 11, no officer of excise can grant a renewal of a license, except upon the production of such certificate.—[HAYES, J.]

How long does the license continue?—LEFROY, C. J. The 17 & 18

Vic., c. 89, reduces the time of the duration of the license to a year, unless it be renewed.]—The important question to be decided here is, whether, when the Justices have exercised their discretion in refusing to sign the certificate, this Court can compel them to exercise that discretion otherwise, and in a manner the very opposite of their own opinion? The ground of the refusal to sign the certificate in this case, as stated in the Petty Sessions book, is, that the applicant's house was not properly conducted during the past year.—[LEFROY, C. J. Suppose the Act of Parliament had never given an appeal, but the decision of the matter had rested solely in the discretion of the Magistrates, could a party come to this Court to have the question tried, whether the Magistrates had decided properly or not?]—Certainly not; because, where Magistrates have a discretion vested in them, and they exercise that discretion, this Court cannot interfere; a mandamus is only granted to compel Magistrates to hear a matter over which they have jurisdiction, but which they decline to hear. In the words of Lord Ellenborough, in *The King v. The Justices of Kent* (a), "The Court would interfere 'so far as to set the jurisdiction of the Magistrates in motion, by 'directing them to hear and determine the application.' Formerly the certificate was signed by the inhabitants of the neighbourhood in which the public-house was; but, as that led to abuses, the duty of signing it is now thrown upon the Magistrates sitting in Petty Sessions.—[He was then stopped, and the Court called upon]—

Curran and W. J. Sidney, contra.

We admit that, where Magistrates have a discretionary power, this Court will not interfere with the exercise of that discretion, by granting a mandamus. But, in this case, unless the Magistrates be compelled to act, the statute will be inoperative.—[LEFROY, C. J. That is, be compelled to act in one particular manner. The jurisdiction conferred upon them is to grant or to refuse the certificate;

(a) 14 East, 395, 397.

but you call upon them to act in one particular manner only.]—**E. T. 1859.**
Queen's Bench
THE QUEEN
v.
JUSTICES OF
CO. DUBLIN.

The order of the Magistrates was reversed by the Chairman of the county.—[PERRIN, J. The Chairman pronounced an order, merely reversing what was done by the Magistrates; but the effect of that is not to pronounce a new decree in favour of the party appealing. This is analogous to the case of a civil-bill appeal; when the decree below is reversed, no new decree is made in favour of the appellant.]—If the Magistrates persist in their refusal, how is the Act of Parliament to be enforced? because, if the party do not produce this certificate, the Excise will not grant him a renewal of his license.—[PERRIN, J. Your argument goes to this, that the Chairman did not do his duty, because he did not give the prosecutor a certificate of good character.—LEFROY, C. J. Can we amend this Act of Parliament? Your case is clearly a *casus omissus*; and, as the Act of Parliament has not provided for it, we cannot do so].—

Cause shown allowed with costs.

CHARLES POWELL LESLIE v. MICHAEL JOHNSTONE.*

April 29.

USE AND OCCUPATION.—The summons and plaint complained that the defendant was indebted to the plaintiff in the sum of £70 sterling, on account of money payable by the defendant to the plaintiff, for the defendant's use, by the plaintiff's permission, of part of the lands of Pelletstown, situate in the barony of Ratoath and county of Meath, the particulars of which were indorsed thereon. The indorsement of particulars was as follows:—"1858, November 1st.

plaintiff's permission, of part of the lands of P., situate," &c., the defendant demurred, upon the ground that it did not appear therefrom that the lands were the lands of the plaintiff.—*Held* (overruling the demurrer), that a good cause of action was disclosed by the plaint, by reason of the averment that the defendant occupied the lands by the plaintiff's permission.

Although forms of action are abolished by the Common Law Procedure Act, the plaint must nevertheless disclose a cause of action good in substance.

The forms in the Common Law Procedure Act 1858, sch. B, are not obligatory.

* *Coram* LEFROY, C. J., PERRIN and O'BRIEN, JJ.

E. T. 1859. "One half-year's rent of part of the lands of Pelletstown, due to the
Queen's Bench. "plaintiff on this day, £70—Total, £70."

LESLIE
v.

Demurrer to the summons and plaint.*

JOHNSTONE.

Devitt, for the demurrer.

The summons and plaint deviates from the form given in schedule C to the Common Law Procedure Act 1853, in not stating that the lands in question were "the lands of the plaintiff;" neither is that allegation contained in the indorsement of particulars. In *Corah v. Young* (a), an omission to aver that the work was done at the request of the defendant was held fatal, upon demurrer, being a deviation from the form given by the Common Law Procedure Act, which, although it has abolished the forms of action, has not abolished the necessity of showing by the plaint a legal cause of action; and, in the present case, the summons and plaint does not disclose any cause of action good in point of law. The action of use and occupation is founded upon a contract expressed or implied: 2 *Fur. L. & T.*, p. 926, citing *Hall v. Burgess* (b); *Strachan v. Smith* (c); *Clarke v. Webb* (d); *Church v. Imperial Gas-light Co.* (e). Every one of the old precedents contain an averment that the lands were held by the defendant, and at his request, and by the permission of the plaintiff; and this was an essential averment. It is true that this averment is not in the form given by the Common Law Procedure Act 1853; but the Act itself supplies that omission, by an averment that the lands are the lands of the plaintiff. To an action of use and occupation, the defendant cannot plead *nil habuit in tenementis*: *Lewis v. Willis* (f); *Curtis v. Spitty* (g).

(a) 6 Ir. Com. Law Rep. 138.

(b) 5 B. & C. 332; S. C., 8 D. & Ry. 67.

(c) 4 Bing. 91, 94; S. C., 12 B. Moo. 269.

(d) 4 Tyrw. 673; S. C., 1 C., M. & R. 29.

(e) 6 Ad. & El. 846, 854.

(f) 1 Wils. 314.

(g) 1 Bing., N. C., 15.

* NOTE.—The point of demurrer noted for argument by the defendant was, "That a good cause of action is not disclosed by the summons and plaint, as it is not therein stated that the lands for the use of which the action is brought are the lands of the plaintiff."

—[PERRIN, J. The lands are named in the plaint, and the plaintiff avers that the defendant held the lands by the permission of the plaintiff.]—Where an express contract is not relied upon, the summons and plaint should show some title in the plaintiff.

E. T. 1859.
Queen's Bench
 LESLIE
 v.
 JOHNSTONE.

Ryan, contra.

This case is concluded by authority. The forms in the Common Law Procedure Act are not obligatory, provided a cause of action good in substance is disclosed by the summons and plaint: *Gason v. Ryan (a)*. Here there is an averment that the defendant enjoyed the use of these lands, by the permission of the plaintiff. The defendant, by the demurrer, admits that allegation to be true; and it is not open to him, therefore, to say that the summons and plaint does not disclose a cause of action, because it does not aver that the lands are the lands of the plaintiff. If that averment were in the summons and plaint, the defendant would not be allowed to traverse it; and this is the test of its materiality. It is for this reason that *nil habuit in tenementis* is a bad plea to an action of use and occupation, because the tenant is estopped from disputing his landlord's title. *Lewis v. Willis (b)* was an action in assumpsit; *Curtis v. Spitty (c)* was in debt. *Sylleran v. Strading (d)* shows that the plea of *nil habuit in tenementis*, to an avowry for rent on a parol demise, is bad. When the gist of the cause of action is omitted, such an omission as that is fatal: *M'Neal v. M'Court (e)*; but here that is not the case; for the gist of this action is, that the defendant occupied the lands by the permission of the plaintiff; and that averment is in this summons and plaint. The averment of a request by the defendant is not at all necessary; because such request is implied from the occupation of the defendant himself.

Devitt replied.

LEFROY, C. J.

The only argument which might have been urged with any

(a) 7 Ir. Jur. 272.

(b) *Supra*.

(c) *Supra*.

(d) 2 Wils. 209.

(e) 6 Ir. Jur. 256.

E. T. 1859. *show of substance, in this case, is this, that, as the Common Law*
Queen's Bench Procedure Act has let loose the established forms of pleading; it
 is of importance to hold parties strictly to the forms of pleading
LESLIE
v.
JOHNSTONE. which have been substituted by that Act. But, although the
 Common Law Procedure Act has thus let loose the old form
 of pleading, and substituted new ones, there is an express provi-
 sion (section 53) that the forms of pleading contained in the
 schedule annexed to the Act shall be sufficient, in the case
 to which they apply, and that a departure from the letter of
 them shall not be matter of error or irregularity. The Act
 itself, therefore, disposes of that argument. Now, the spirit and
 purpose of the Common Law Procedure Act, with respect to the
 forms of pleading, is, as we have already held in a case (a)
 which has been referred to, and indeed, as the Act itself (b)
 shows, that a defect which, heretofore, could be objected to only
 by special, and not by general demurrer, shall not render a
 pleading insufficient, or deprive a party of the right of stating
 a good and substantial cause of action. The plaintiff, in this case,
 states, that "The defendant is indebted to the plaintiff in the sum
 of £70 sterling;" that is admitted. Here then is a debt, and
 a good cause of action so far. But, it is matter of substance
 that a good consideration be also stated; and the consideration
 is, accordingly, stated thus, "For the defendant's use, by the
 plaintiff's permission, of part of the lands of Pelletstown, situate," &c.
 But, it is contended, on the part of the defendant, that the plaintiff
 does not allege, as was done in all the precedents prior to the passing
 of the Common Law Procedure Act, that the lands were occupied
 at the request of the defendant, and that the consideration, there-
 fore, in the present case, being a past one, according to the
 authorities, the request should have been averred. The answer
 to that, however, is this, that the summons and plaint discloses
 that from which, of necessity, it must be implied that the defend-
 ant was a consenting party to this contract from the beginning
 (and it is only to show that, that a request was stated); for it avers
 the defendant's occupation of the lands to be by the permission
 of the plaintiff; that permission of the plaintiff being the gist of

(a) *Gason v. O'Ryan* (7 Ir. Jur. 272).

(b) Section 81.

the action, overriding the whole of the defendant's occupation from first to last, and implying, from the fact of the defendant's entry upon the premises, that they were occupied by him from first to last by the plaintiff's permission. Such an occupation, therefore, necessarily implies consent on both sides, *actus contra actum*; the one occupying the land by permission of the other, and the other giving him his permission to do so. Under these circumstances, we have no doubt that this demurrer must be overruled: the authorities, the reason of the thing, and the principle of the late Act of Parliament, all combining to lead us to that conclusion.

E. T. 1859.
Queen's Bench
LESLIE
v.
JOHNSTONE.

PERRIN and O'BRIEN, JJ., concurred.

WILLIAM MURPHY, Administrator of Anne Murphy,

v.

CHARLES LOGAN.

May 3.

ACTION by the plaintiff, as husband and administrator of his deceased wife, to recover compensation under the 9 & 10 Vic., c. 93, To an action by the plaintiff, as husband and administrator

of his deceased wife, to recover compensation under Lord Campbell's Act (9 & 10 Vic., c. 93), the defendant pleaded, *inter alia*, that the plaintiff did not, with the summons and plaint, deliver to the defendant, or to his attorney, a full particular of the persons for whom and on whose behalf the action was brought, and of the nature of the claim in respect of which damages were sought to be recovered in the action, as required by the statute, intituled, &c.—*Held*, upon demurrer, that the plea was no answer to the action, the requirements of section 4 of the 9 & 10 Vic., c. 93, that the particulars therein specified shall be delivered together with the declaration to the defendant, or his attorney, being merely in accordance with the rules and practice of the Court in which the action may be depending; the right of action accruing prior to the issuing of the declaration, and existing altogether independent of the fact of the declaration being issued or not.

In such case, the defendant, if he require particulars, should call upon the plaintiff to furnish them; or, in case of his refusal, apply to the Court to compel him to do so.

* *Coram* PERRIN and HAYES, JJ.

E. T. 1859. *Queen's Bench*
MURPHY
v.
LOGAN.

The summons and plaint alleged that the defendant, being possessor of a certain cart and a horse drawing the same, which were under the government, care and direction of a servant of the defendant, the defendant so carelessly, unskilfully and improperly drove, governed and directed the said horse and cart, that the said cart struck with great force against the said Anne Murphy, and thereby so crushed her, that, by reason of the injuries so received, she died. It also alleged that the action was brought by the plaintiff as the administrator of the said Anne Murphy, and for the benefit of the plaintiff (being her husband), and of the children of the said Anne Murphy.

The defendant, by his first defence, denied the carelessness, negligence or unskilful or improper conduct on the part of his servant, as alleged by the plaint; and also denied that it was by reason of the said alleged injuries that the death of the said Anne Murphy was caused; and after stating that the said Anne Murphy, by the exercise of ordinary care, could have avoided collision with the said cart, pleaded as a further defence, "That the plaintiff did not, with the summons and plaint, deliver to the defendant, or to his attorney, a full particular of the person or persons for whom and on whose behalf this action has been brought, and of the nature of the claim in respect of which damages are sought to be recovered in this action, as required by the statute in such case made and provided, and which is intitled 'An Act for Compensating the Families of Persons Killed by Accidents.'" To this last defence the plaintiff demurred, upon the ground that the said defence did not traverse, or confess and avoid the statements of the plaint, or any of them; and because the said defence took or tendered no material issue of fact; and because the writ of summons and plaint itself was a sufficient particular within the meaning of the said statute, and because said defence was pleaded in bar to the action generally, which it could not be, and because said defence was altogether insufficient in law, and did not state any manner of legal defence to the action.*

* NOTE.—The points of demurrer noted for argument were, first;—That the non-delivery of the particulars, as relied on by the defence, is no ground of defence.

C. R. Barry (with him *E. Sullivan*), for the demurrer.

E. T. 1859.
Queen's Bench

MURPHY
v.
LOGAN.

The question in this case turns on the construction of the 9 & 10 *Vic.*, c. 93, s. 4.* The defence demurred to relies upon the non-delivery of the particular together with the declaration, required by that section, as an answer to the present action. In this, however, the defence is defective, the provisions of the section not being mandatory, but merely directory; all that is meant by this section is simply to put the present action upon the same footing as those actions in which a bill of particulars is required to be furnished, and in which, if these particulars are not furnished, the defendant's course is to apply to the Court to set aside the proceedings, or to require the plaintiff to give such particulars. That, however, results from the practice of the Court; but here, as the statute in question is merely directory, containing, as it does, only affirmative words, a non-compliance with it does not constitute a bar to the action. The distinction between statutes that are directory and those that are mandatory is now well settled. "There is a well known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory:" Lord Mansfield, C. J., in *Rex v. Loxdale* (a). This distinction is also recognised by Taunton J., in *Pearce v. Morris* (b), and in *The King v. Justices of Leicester* (c).

(a) 1 Burr. 445, 447.

(b) 2 Ad. & El. 84, 96.

(c) 7 B. & Cr. 6.

* NOTE.—This section is as follows:—"And be it enacted, that in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant, or his attorney, a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

Secondly.—That it is not necessary to deliver such particulars to the defendant, or his attorney, with the plaint, in manner and form as in the defence mentioned.

Thirdly.—That the defence neither traverses, nor confesses and avoids, the material statements of the plaint, or any of them, and tenders no material issue.

Fourthly.—That the defence does not show any breach of, or non-compliance with, any provision of the statute applicable to the case.

Fifthly.—That the plaint is a sufficient particular.

Sixthly.—That the defence is pleaded in bar to the action generally.

Seventhly.—That the defence is wholly insufficient in law, and states no manner of legal defence.

E. T. 1859.
Queen's Bench
 MURPHY
 v.
 LOGAN.

The non-delivery of this particular with the declaration is not of the essence of this action; nor does the statute go on to enact that no action shall be brought unless the provisions of this section be complied with. This will be more apparent, upon contrasting the language of this section with that of section 9 of the 12 Vic. c. 16, which requires notice of the intention to bring an action against a Justice of the Peace to be given to him one month before the bringing of such action; which provides that "No such action shall be commenced against any such Justice of the Peace, until one calendar month, at least, after notice in writing of such intended action shall have been delivered to him," &c.; and then by section 12, "If, at the trial of any such action, the plaintiff shall not prove that such notice as aforesaid was given one calendar month before such action was commenced, the plaintiff shall be nonsuited, or the jury shall give a verdict for the defendant." Again, there are cases in which the doing of a certain thing is a condition precedent to the bringing of the action: *The King v. The Inhabitants of Birmingham* (a); *Cole v. Green* (b); *In re Burdon* (c); but here the action must be brought in the first instance. If the Court hold that the provisions of section 4 are mandatory, that will be, in effect, deciding that no action could have been brought under this statute prior to the Practice and Process Act, since, before that Act, the declaration was never delivered to the defendant, and it was by that Act that a copy, and merely a copy, was furnished to the defendant. But when we come to consider the Common Law Procedure Act 1853, the case is *a fortiori*, because since that statute there is no such thing as a declaration. By section 5 of that Act, the summons and plaint directed to be filed with the Pleadings Assistant of the Court in which the action is depending "shall be deemed a pleading of the plaintiff, in lieu and instead of a declaration." If, therefore, the construction contended for by the defendant be put upon this 4th section of the 9 & 10 Vic., c. 93, it will be impossible, in the present state of the law, to carry it out. This defence is also defective since it is pleaded

(a) 8 B. & Cr. 29.

(b) 6 M. & Gr. 872.

(c) 27 Law Jour., C. P., 250.

in bar to the action generally. A plea in bar must go to the whole of the action; it must be a complete answer, and show matters from which it will be apparent, assuming the facts to be true, that, at the time of the issuing of the summons and plaint, the plaintiff had no cause of action. It is, however, admitted that, at the time of the issuing of the summons and plaint, the plaintiff had a good cause of action; so that this curious result will take place, that, as the summons and plaint is valid for six months, the plaintiff, having a good cause of action for six months, may, through a mistake of the process-server in not serving a bill of particulars, be unable to proceed with his action. The summons and plaint itself furnishes sufficient particulars, and, as such, is a compliance with section 4. If the defendant be not satisfied with them, he must apply to the Court, the course pointed out as being the proper one, by the case of *Hull v. Ballard* (a), which was decided upon the construction of the 15 & 16 Vic., c. 83, a statute much more stringent than the present.

E. T. 1859.
Queen's Bench
 MURPHY
 v.
 LOGAN.

O'Riordan and Serjeant *Deasy*, contra.

In cases of actions against Magistrates, the notice required to be given by the statute is a restriction of the Common Law right of the subject. Prior to the 9 & 10 Vic., c. 93, no action was maintainable at Common Law for injuries of the nature contemplated by that statute, by which, for the first time, a remedy was given. The rule in such cases is this; that where a statute, for the first time, gives a right or a remedy which did not exist before, that then the party seeking to enforce that right, or avail himself of that remedy, must proceed in the way pointed out by the Act; but where, to a requirement of the Common Law, anything is superadded by a statute, then a non-compliance with the terms of the statute will not be fatal, unless the statute says that such non-compliance shall render the proceeding void. When the Act in question says that the particular is to state the nature of the claim in respect of which damages are sought to be recovered, that means the position in life of the plaintiff, in order that the defend-

(a) 1 H. & N. 134; S. C., 25 Law Jour., Exch., 304.

E. T. 1859.
Queen's Bench.

MURPHY

v.

LOGAN.

ant may knew the amount of compensation he should either pay into Court, or, by arrangement out of Court, give to the plaintiff. The damage must be a pecuniary one. In this case, as it is by the statute alone the plaintiff can recover any compensation, the course pointed out by it should have been followed by the plaintiff. That has not been done. Sections 11 and 16 of the Common Law Procedure Act 1853 refer merely to matters of procedure; and non-compliance with their provisions is, therefore, only an irregularity. Although the term "declaration" is not used in the Common Law Procedure Act 1853, yet the summons and plaint, being substituted for it, must, equally with the declaration, show a good cause of action: sections 5 & 10. By section 19, all statutes relating to actions, or the pleadings therein, &c., not inconsistent with the Common Law Procedure Act, nor thereby repealed, are to be in force with reference to actions brought after the commencement of the Common Law Procedure Act.

E. Sullivan was not called upon by the Court to reply.

PERRIN, J.

When it is enacted, by section 4 of the 9 & 10 Vic., c. 93, that the particulars therein specified shall be delivered, together with the declaration, to the defendant or his attorney, that is a requirement merely in accordance with the rules and practice of the Court in which the action may be depending. But the right of action accrues prior to the issuing of the declaration, and exists altogether independently of the fact of the declaration being issued or not. If the defendant require particulars, he should call upon the plaintiff to furnish them; or, in case of his refusal, apply to the Court to compel him to do so. This demurrer must be allowed with costs.

HAYES, J., concurred.

Demurrer allowed with costs.

E. T. 1859.
Queen's Bench

In the Matter of T. FRANKS and A. T. FORSTER, Trustees of the will of T. C. KEARNEY, deceased, on behalf of T. C. KEARNEY an infant; and a certain Presentment, passed by the Grand Jury of the County of Cork, at the Summer Assizes 1858, for the construction of a Timber-bridge over the Bandon River at Tissanon.*

May 7.

G. FITZGIBBON had, on the 18th of March last, obtained a conditional order for a *certiorari*, to remove into this Court a presentment passed by the Grand Jury of the county of Cork, at the Summer Assizes 1858, whereby the sum of £2350 was presented to be raised off the county at large, £1500 off the barony of Kinsale, and £900 off the barony of Courceys, for the purpose of constructing a timber-bridge, with portcullis and causeway, across the Bandon river, on the road from Kinsale to Courceys country, between the lands of Tissanon, on the Kinsale side, and the lands of Kilnaclona on the Courceys side, with all documents connected therewith, in order that same might be quashed.† It appeared, by the affidavit of

A presentment for a bridge had been passed by the Grand Jury, and stated; voluntary contributions were raised in aid of the presentment, and part of the sum presented had been levied; the contractor also had expended considerable sums in labour and materials, in

preparing for the construction of a bridge.—*Held*, that the Court would not, upon the application of parties who had actively concurred in passing the presentment, and had since acquiesced in it, grant a *certiorari*, to bring up the presentment, for the purpose of quashing it, upon the grounds that the Grand Jury had no authority to grant it, and that it was void upon the face of it, for omitting to state the section of the statute, and the year of the King's reign in which one of the statutes relied on had been passed.

Held also, that it made no difference that the parties who had so concurred and acquiesced were trustees for an infant, whose rights might possibly be prejudiced by the construction of the bridge.

* O'BRIEN, J., *absente*.

† *NOTE*.—The following grounds for quashing the presentment were stated in the conditional order:—First—That the Grand Jury had no legal power or authority to make the presentment, under either of the Acts therein referred to.

Second.—That the presentment was illegal, there being in fact no such road as that mentioned in the presentment in existence; the truth and fact being that there did not exist, at the time when the presentment was made, nor since, any road whatever at either side of the river upon the land on which, according to the presentment, the bridge was to abut.

E. T. 1859.

*Queen's Bench**In re*
FRANKS.

T. Franks, that applications for the presentment had been made at the Kinsale Presentment Sessions held in the barony of Kinsale on the 8th of January 1858, and at the Presentment Sessions held in the barony of Courceya, on the 21st of January 1858, and, having been approved of and adopted at these Sessions respectively, were submitted to the Grand Jury of the county of Cork, at the ensuing Spring Assizes, and were then approved of, and certified by the foreman. That the applications were again submitted, on the 5th and 17th of June 1858, to the said Presentment Sessions respectively; and, having been again approved of and adopted, were submitted to the Grand Jury for the county of Cork, at the Summer Assizes 1858, when the presentment was finally approved of and passed, and was subsequently stated by the Judge of Assize. That the statutes mentioned in the presentment were 6 & 7 W. 4, c. 116, ss. 12, 16, 20, 50, 51, 56, 60, 61, 128, 174, and also the Act* W. 4, c. 2. That, by letters patent of the 7 W. 3 (13th of February 1694), divers lands and ferries including the ferry of Kinsale, were granted to J. Roche, his heirs and assigns, to be held of the Crown in free and common socage at the yearly rent of £4. 10s. That J. Roche's estate and interest in the said ferry had vested in J. C. Kearney, who, by his will in 1844, devised the same to T. Franks and A. T. Forster, and their heirs, in trust for T. C. Kearney in tail. That the tenant in tail was an infant under the age of twenty-one years. That the ferry was situate on the Bandon river, where it flows into the harbor of Kinsale, opposite to the town; and, there being no other ferry nor any ford across the river, for several miles, was the only means by which cattle and goods could be transported from one side of the river to the other, and traffic carried on between Kinsale and the town.

* This Act is the 7 W. 4, c. 2; it was not accurately stated in the presentment, the King's reign and the section being both omitted.

Third.—That the year of the King's reign, and the chapter and section of the statute under which the presentment purported to be made, were not mentioned in the presentment, as required by 6 & 7 W. 4, c. 116, s. 127.

Fourth.—That the proposed bridge would be an illegal interference with the rights of the minor, and with his property in the ferry over the Bandon river.

sale and the barony of Courceys. That the ferry was let at an average annual rent of £100. That the building of the proposed bridge would divert the whole traffic from the ferry, which, nevertheless, the owner would be bound to maintain.

E. T. 1859.
Queen's Bench
In re
 FRANKS.

The affidavit also alleged that there was no road whatever leading to the points at either side of the river upon which the proposed bridge was to abut, and that the statements to the contrary in the applications to the Presentment Sessions were untrue. By the affidavits filed for the purpose of resisting the *certiorari*, it appeared that, in the applications to the Presentment Sessions, the statutes were correctly mentioned. That the said A. T. Forster had been the Chairman of the Presentment Sessions held in the barony of Courceys, on the 21st of January and 17th of June 1858, at which the applications had been approved of and adopted. That the bridge was a work of public utility, and absolutely necessary. That a voluntary subscription of £1500 had been raised by the ratepayers and proprietors of land in the baronies of Kinsale and Courceys, and paid to the Treasurer of the county of Cork, in aid of the presentment. That the said T. Franks and A. T. Forster entered a traverse for damages, for the loss of the tolls of the ferry, at the Cork Spring Assizes 1858, which was subsequently *nilled*, no person appearing to sustain the traverse. That the contractor for the bridge had expended large sums in the purchase of materials, and in the preparation for the construction of the bridge, and that he had not received any notice to warn him against such preparations, which would be valueless to him if the presentment were quashed. It was also alleged, by the affidavits against the *certiorari*, that the roads leading to the points at the opposite sides of the river, where the bridge was to be constructed, had been made several years since by presentment, and were still in existence; and it was also alleged that the ferry in question would not be injured by the construction of the bridge.

Serjeant *Deasy* (with him *O'Riordan*) now showed cause.

One of the persons who seeks now to question the presentment was Chairman of two of the Presentment Sessions at which succes-

E. T. 1859.
Queen's Bench
In re
 FRANKS.

sively the presentment was passed; and a traverse for damages entered by both the parties applying for this *certiorari*, which, however, they did not choose to follow up. The applications for the presentment, and the presentment itself, were duly investigated at the Presentment Sessions and Assizes; and the presentment being legal, and these parties having pretermitted their time for objection, and neglected to pursue their traverse for damages, will not be permitted now to question this presentment; large sums have been expended, and agreements entered into on the faith of its validity. The parties have lain by so long that the Court will not yield to this application: *Ex parte Henn* (a). The existence of roads at the places indicated for the bridge was a matter for the local Presentment Sessions to examine; and the fact of their existence is shown, beyond dispute, by the affidavits filed as cause.—[PERRIN, J. Has any part of the presentment been levied?—Yes;* and what is now to be done with the money which has been raised? *The Queen v. M'Kay* (b). The proposed bridge is a public benefit, and it is not designed either to avoid or as a fraud upon the ferry; its interference with the ferry, therefore (even if that should be its result), is no ground of objection: *Tripp v. Frank* (c); *Hussey v. Field* (d).

Jellott, for the contractor, was not called upon by the Court.

G. Fitzgibbon and *W. A. Exham*, for the trustees of the will of *C. Kearney*, in support of the conditional order.

This Court will not bind a minor, by the alleged acquiescence of one of his trustees. It was necessary to abandon the traverse for damages for injury to the ferry, because it was not sustainable under the Grand Jury Act (e). The facts disclosed by affidavits show that a presentment for the proposed bridge is illegal, *ultra vires* of the Grand Jury; and this Court will therefore examine

(a) 6 Ir. Com. Law Rep. 239.

(b) 2 Ir. Law Rep. 16.

(c) 4 T. R. 686.

(d) 2 C., M. & R. 432.

(e) 6 & 7 W. 4, c. 116, s. 134.

* This fact was stated at the Bar.

into the presentment. In the case of *Ex parte Henn*, the objection which was relied on was merely an informality, not an absolute illegality in the presentment. In that case, the Grand Jury had authority to grant the presentment; but, in the present case, they had no authority whatsoever under the 6 & 7 W. 4, c. 116, ss. 56, 57. The Court will investigate whether there are any such roads leading to and from the banks of the river at each end of the proposed bridge, as alleged. The affidavits show that there are no such roads; in fact, they are roads marked out and commenced, but never finished, or opened for traffic. Lastly, the presentment is void on the face of it—6 & 7 W. 4, c. 116, s. 127—because it does not state the chapter or section of the second Act relied on.

E. T. 1859.

*Queen's Bench**In re*
FRANKS.

LEFROY, C. J.

The minor is represented in this Court by his trustees; he is bound by their acquiescence, and we cannot allow the doctrines of Courts of Equity to interfere with legal principles. The Court is called upon now to make the order for a *certiorari* absolute—to set afloat this presentment, which has been acquiesced in for a long time, and under which money has been levied. These trustees actively concurred in the presentment, and afterwards choose to look on, and suffer all these matters to be accomplished; they are not, therefore, entitled now to call upon this Court *quieta movere*. In allowing the cause shown against the conditional order, we are acting on the well-known Common Law maxim, *vigilantibus non dormientibus jura subveniunt*. We do not, however, think it a case for costs.

Cause allowed without costs.

E. T. 1859.
Queen's Bench.

TUOHEY

THE GREAT SOUTHERN AND WESTERN RAILWAY
 COMPANY.*

May 10.

The plaintiff occupied a dwelling-house abutting on a public high road. A Railway Company, in the execution of the works of their Railway, raised the public high road to the height of ten feet, opposite to the plaintiff's house; and the special damage resulting from the acts of the defendants was, as the plaintiff alleged, that the access to his house was impeded, and the house rendered damp and unwholesome by rain and mud which penetrated into it from an adjoining bridge, whereby the plaintiff lost his health. To an action

Action for injury to the plaintiff's house and premises, by the defendants, in the execution of the works of their Railway.

Second count.—That, to wit, on the, &c., the defendants, in the construction of a Railway, to wit, from, &c., and in the exercise of the power given by the Railways Clauses Consolidation Act 1845, and other statutes in that case made and provided, raised by heaping earth to the height of, to wit, ten feet, and used a certain public road leading from, &c., at a certain part thereof, opposite to the messuage and premises of the plaintiff, hereinafter mentioned and elevated the same to a height of, to wit, ten feet above its former level, and thereby rendered the same inconvenient to passengers and to the plaintiff, being one of the persons entitled to the use of the said road; and the plaintiff saith that the defendants did not before the commencement of any such operations, cause a sufficient road to be made instead of the road so interfered with, and did not maintain any such substituted road in a state as convenient for passengers and carriages as the road so interfered with; and the plaintiff saith that he was, at the time of the committing of the said grievances by the defendants, and thence hitherto has been and still is, lawfully possessed of a certain messuage and premises, with the appurtenances, situate, &c., adjoining the said

brought by the plaintiff for these grievances, against the Railway Company, under the Railways Clauses Consolidation Act 1845, ss. 53, 55, the Company pleaded a justification, under their Private Act and the statutes in that case provided.—*Held*, overruling a demurrer to the defence, that the action was not maintainable, the plaintiff's loss of health being the consequence of the injury to his house, and such injury being of a permanent nature, and the subject of compensation by the arbitrator, pursuant to the 14 & 15 Vic., c. 70.

* O'BRIEN, J., *absente*.

public road; and, by reason thereof, the plaintiff, during all the time aforesaid, ought to have had, and still ought to have, a certain right of way into the public road so interfered with, that is to say, a level crossing and way, over and out of the said public road, into the said messuage and premises of the plaintiff, with the appurtenances, and from and out of the said messuage and premises of the plaintiff, with the appurtenances, into and over the said public road, at the part thereof so raised and used by the defendants, for the plaintiff, his family and servants, on foot, to go, return and pass and re-pass, at all times; and the plaintiff saith that he hath suffered special damage, by reason that the said defendants, by so heaping earth upon and raising said road, have rendered said level crossing and way broken and impassable, and did not cause another sufficient road to be made before they interfered with the said public road by so raising it to a height of, to wit, ten feet, as aforesaid, opposite to the said messuage and premises of the plaintiff; and by reason that the defendants have not caused any sufficient road to be made, whereby the said level crossing, to which the plaintiff was so as aforesaid entitled, has been destroyed, and the said way from the plaintiff's messuage and premises, with the appurtenances, into and over the said public road, has been interrupted, and made dangerous and extraordinarily inconvenient to the plaintiff, his family and servants, and the plaintiff has been deprived of his previous mode of access to his said messuage and premises; and by reason of the said elevation of the road in front of the plaintiff's said house and premises, and of said interference with the plaintiff's said right of way, the rain water and mud from an adjoining bridge, and from said high road, run into plaintiff's house aforesaid, and in wet weather renders same unwholesome; and the plaintiff saith that, in consequence of plaintiff's said house being so rendered unwholesome, by reason of defendants having so interfered with plaintiff's right of way, plaintiff became sick and confined to his bed from illness, to wit, for the space of ten weeks; and plaintiff saith that he suffered such special damage, amounting in the whole to, &c.

Third count.—That on, &c., the defendants raised and used a certain public road, leading, &c., at a certain part thereof, opposite

E. T. 1859.
Queen's Bench.

TUOHET
v.

GT. S. & W.
RAILWAY.

E. T. 1859.
Queen's Bench.

TUOHAY
v.

GT. S. & W.
RAILWAY.

to the messuage and premises of the plaintiff, hereinafter mentioned and elevated the same to a height of, to wit, ten feet above its former level, and thereby rendered the same extraordinarily inconvenient to passengers and to the plaintiff, being one of the persons entitled to the use of said road; and plaintiff saith that the defendants did not, before the commencement of any such operations, cause a sufficient road to be made, instead of the road so interfered with, and did not maintain any such substituted road in a state as convenient for passengers and carriages as the road so interfered with. This count contained averments of the plaintiff's possession of a messuage, &c., and, by reason thereof, of his right of way over a level crossing, similar to the averments in the second count; and it also contained averments of special damage, by reason of the defendants' acts in the premises, similar to the averments of special damage in the second count.

The plaint also contained other counts, the defences to which were not demurred to.

To the second and third counts the defendants pleaded four defences; viz., first, a traverse of the special damage; second, a traverse of the injuries to the public road; third, that the earth was heaped upon said public road, and same was raised, as in said second and third counts, and each of them, alleged, by the defendants, in the due exercise of their powers and in pursuance of the statutes in that case provided; and also by virtue of a certain Private Act of Parliament passed, &c., and intituled, &c. (a); and if the plaintiff or his premises were thereby injuriously affected, he ought to have pursued the remedy in that behalf by the said Acts of Parliament provided; and he has not any right to resort to or sustain an action at Law for said alleged injuries; fourth, that the right of way and level crossing claimed by the plaintiff was, from and to his house and premises, as in plaint mentioned, into and off a certain public road leading, &c., and portion of which said public road was adjoining to, abutting upon and opposite to the house and premises of the plaintiff; and defendants say that, in the due exercise and execution of the powers

(a) The Roscrea and Parsonstown Junction Railway Act.

given to them by the said statutes, in the second count of the summons and plaint mentioned, and of the statute in said third defence mentioned, and in pursuance thereof, said defendants raised said public road, as in said summons and plaint mentioned, and executed and performed the works in the second and third counts of said summons and plaint mentioned; and if the plaintiff, or his property, or the right of way and level crossing by him claimed were, as alleged by him, injuriously affected thereby, he ought to have pursued the remedy in that behalf by the said Acts of Parliament provided, and has not any right to resort to or sustain an action at Law for the injuries by him in said counts alleged.

E. T. 1859.
Queen's Bench.
TUOHNEY
v.
GT. S. & W.
RAILWAY.

Demurrer to the above third and fourth defences, on the ground that the said defences respectively admitted the matters complained of, and offered no answer to the same; and because the plaintiff had pursued the remedy pointed out by the said Acts, and was entitled, by the said Acts, to maintain an action at Law for the special damage occasioned by the several matters complained of in the second and third counts.*

Heron, for the demurrer, in addition to the cases cited on behalf of the plaintiff in *Moore v. The Great Southern and Western Railway Company* (a), cited, upon the point of special damage, *Morley v. Praynell* (b), *Maynell v. Saltmarsh* (c), and distinguished the present case from that of *Moore v. The Great Southern and Western Railway Company*, on the ground that the special damage which was sustained by the plaintiff in the present case was not by reason of an injury merely to his house, but by reason of the plaintiff's loss of health.

(a) *Ante*, p. 46.

(b) *Cro. Car.* 510.

(c) 1 *Keb.* 847.

* **NOTE.**—The following points were noted for argument:—First; that the said defences are bad in law, and offer no answer to the second and third counts. Second; that the plaintiff is entitled to maintain an action at Law for the special damage in said counts complained of.

L. T. 1869. *G. Fitzgibbon and Coffey, contra*, were not called upon by 2
Queen's Bench. Court.

TOOMEY

ST. A. & W. RAILWAY. *Larroy, C. J.*

We have no doubt about this case. The cause of injury which the plaintiff seeks to recover damages in this action, directly the converse of that which was complained of in the case of *Moore v. The Great Southern and Western Railway Company*. That was the lowering, this is the raising, of a road. But it is not that there is a distinction between the two cases, as to the nature of the damage; that the special damage which the plaintiff, in the present case, complains of is not, as in *Moore's case*, the inconvenience which he has suffered regarding his house, but an inconvenience of a different kind; namely, a special injury to his health, by reason of his house having been rendered unwholesome. Now, going back to the principles of pleading, which, although forms of pleading are abolished, are, nevertheless, still useful in ascertaining what the law is, I apprehend the rule of pleading to be this:—If a person brought an action for a trespass or other injury, and also alleged special damage, as the result of that particular injury (laying it, as was called, under a *per quod, per quod* the special damage accrued to him), if the defendant justified the particular injury complained of, surely that was an answer to the special damage. If the defendant justified or legally answered the principal injury all the accessories fell to the ground. What difference is there between that case and the present? The plaintiff was entitled to full compensation for the injury to his house, and if the injury was such as to make his house uninhabitable, dangerous or injurious to his health, all these matters are consequential damages, arising from the principal injury, and ought to be included in the compensation for that principal injury, namely, the damage resulting from the injury to his house. A plaintiff may, by the facts on his pleadings, make out an ingenious case; but it might be a very different thing when he went before the arbitrator, whether he could establish those facts. If, however, the matter complained of was incidental to the principal injury affecting his land or house, he was entitled

to be compensated for it in the compensation awarded to him for the principal injury. The cases which have been cited are all cases in which a party was entitled to maintain an action for special damage arising to him from some public nuisance; as, for instance, the obstruction of a highway is a public nuisance; and so, if a furnace were erected in a neighbourhood where one had never existed before, or was not authorised by length of time, producing a noisome smell injuriously affecting any man's health, that is a public nuisance for which, *qua* nuisance, no man can bring an action; but he may do so for special damage to himself or his habitation. But can it be contended that, when an Act of Parliament authorises a Public Company to do that which, but for the Act, would be a public nuisance, namely, either to lower or raise the high road, that that is a public nuisance, and therefore that, at Common Law, the injuries flowing from it are to be dealt with as injuries resulting from a public nuisance? No, it is not a public nuisance, it is a matter authorised by the Legislature; which, while, for the public benefit, it authorises Railways to be constructed, has not dealt so unreasonably as to leave either the public or individuals unredressed for injuries arising from matters of this sort; and, accordingly, not only is compensation given by the Legislature to individuals for any injury which they may sustain, but a penalty is also imposed for not duly substituting a proper road, before proceeding to interfere with an existing one; which penalty, in the case of a public road, may be sued for by the trustees or other persons in whom the management of such road is vested; and, in the case of a private road, by the owner of such private road. If we were to go more at length into the case, we should only be repeating what we said in the case of *Moore v. The Great Southern and Western Railway Company*. We are clearly of opinion that this demurrer must be overruled.

E. T. 1859.
Queen's Bench.
 TUOHNEY
 v.
 GT. S. & W.
 RAILWAY.

Demurrer overruled.

E. T. 1859.
Queen's Bench

MARIA ELIZA BURKE v. JOHN EYRE.*

May 10.

Action on a promissory note, payable to M. C., and by him indorsed to the plaintiff.—Defence; that M. C., being the owner of two statutable mortgages affecting certain lands of which he was in possession, proposed to sell the mortgages to defendant for £200, and falsely and fraudulently represented to defendant that all the rent of the lands had been paid, whereas there were, to the knowledge of M. C., five years' arrears of rent due, for which an ejectment had been threatened; that the defendant, being deceived by such representations, purchased the statutable mortgages, paying therefor £100 cash, and £100 secured by the note relied on, which the defendant averred was void by reason of said fraud; that, after the passing thereof, an ejectment was brought; and, in order to redeem the lands, defendant paid the arrear of rent and costs, which were more than the amount of the note and interest; and that, by reason of the arrear of rent so paid by the defendant, the value of the mortgages was lessened by more than the last mentioned amount. The defence also averred that the plaintiff took the note when overdue, and with full notice of the premises. The plaintiff demurred to this defence.—*Held*, that the defence was no answer to the action.

DEMURRER.—Action on a promissory note for £100, made by defendant to M. Creagh, and by him indorsed to the plaintiff. Defence:—That the said M. Creagh, in the month of April 1858, being owner of two statutable mortgages, on foot of two several judgments, theretofore obtained by the said M. Creagh against Joseph Smith, affecting, amongst other lands of small and inconsiderable value, certain lands called St. Cronan's, in the county of Tipperary, held in fee-farm, at the yearly rent of £14. 18s. 6d. and the legal estate whereof was also then vested in the said M. Creagh, who was in actual possession thereof, upon certain trusts, the said M. Creagh proposed to the defendant to sell, and the defendant, on the representations hereinafter mentioned, agreed to purchase the said statutable mortgages for the sum of £200; and the treaty for which sale the said M. Creagh falsely and fraudulently represented to the defendant that all the rent of the said lands of St. Cronan's had been paid, whereas in truth and in fact there was, to the knowledge and by the default of the said M. Creagh, an arrear of said rent, for five years and upwards, due and unpaid out of and in respect of said lands, and for which proceedings by ejectment for non-payment of rent had then, to the knowledge of the said M. Creagh, been lately threatened; to which facts of said rent being in arrear, and said proceedings being threatened, the said M. Creagh fraudulently suppressed and concealed from the defendant; and the better to deceive the defendant, and to prevent his making inquiry in that behalf, the said

Semble—That the defendant might bring a cross action for the misrepresentation.

* *Coram* LEFROY, C. J., PERRIN and HAYES, J.

M. Creagh falsely and fraudulently represented to the defendant that the Rev. Dr. Blake was then ready and willing to give a sum of money for the existing interest in said lands, which would have been much more than their value, subject to such or to any considerable arrear of rent; acting on and deceived by which said representations, and in entire ignorance of the existence of any arrear of said rent, the defendant agreed to purchase, and did, in fact, purchase, said statutable mortgages, at and for the price aforesaid; and, in part payment thereof, the defendant, being deceived and ignorant as aforesaid, paid to the said M. Creagh the sum of £100 in cash, and, in payment of the residue, and on and for no other consideration, and being so deceived and ignorant as aforesaid, passed to him the promissory note in the summons and plaint mentioned, being wholly void by reason of the said fraud; after the passing whereof the defendant was, for the first time, apprised of the existence of said arrear of rent, for which proceedings in ejectment had, shortly after said sale and purchase, been instituted by the lessors, and under which proceedings the defendant, in order to redeem said lands, had to pay, and did actually pay, said arrear of rent and costs, being more than the amount of said promissory note, and all interest then payable thereon. And the defendant says that, by reason of the existence of said arrear, the value of defendant's said mortgages has been and is lessened, by much more than said last-mentioned amount. And the defendant further says that the said promissory note was not indorsed to the plaintiff until long after the same was overdue and dishonored, and long after the said several facts above mentioned had occurred and taken place, and that the present plaintiff became indorsee of said promissory note, with full notice and knowledge of the premises, and every of them.

To this defence the plaintiff demurred, on the grounds that it appeared from the defence that the defendant elected to act upon the contract with the said M. Creagh, and to retain the benefits thereof, after the defendant had discovered the fraud which he, in the defence, alleged to have been committed on him by the said M. Creagh; and because the defence did not allege that the de-

E. T. 1859.
Queen's Bench.

BURKE
v.
EYRE.

K. T. 1859.
Queen's Bench

BURKE
v.
MYRE.

defendant had repudiated the contract at any time whatever; not because the facts stated in the defence did not show a case of fraud, and because the facts were not stated with sufficient certainty and distinctness; and because the damages alleged to have arisen from the misrepresentation alleged to have been made by M. Creagh could not be set off against the demand of the plaintiff in this action.

W. Hickson (with him *R. Armstrong*), for the demurrer.

This defence is simply that, at the time of the sale of the statutable mortgages to the defendant, there was an arrear of rent upon the lands affected by such mortgages. It seems to be made up of a plea of fraud, and an attempt to set off the damages alleged to have been incurred, in consequence of the breach of contract in respect of the matter for which the promissory note in question was given. The defendant, having elected to hold to the contract, and having reaped the benefit of it, cannot now repudiate that contract and say to the person into whose hands this promissory note has come, that the contract is void, by reason of Creagh's fraud, and that, therefore, this promissory note cannot be sued upon. There is no instance in which damage resulting from the breach of a warranty can be set up as a defence to an action upon a security given for the payment of the price of the thing warranted; although in such action the breach of warranty may be made use of by the defendant, in reduction of damages. The acceptor of a bill of exchange, or the maker of a promissory note, cannot rely, as a defence, upon fraud having been practised upon him in the contract even though the indorsee was privy to the fraud, unless, upon the discovery of the fraud, he repudiate the contract: *Archer v. Barford* (a); *Campbell v. Fleming* (b); *Selway v. Fogg* (c). So long as the party does not repudiate the contract, he is liable to all the incidents of it, as much as if the contract had been in its inception a good and valid one. This defence is, therefore, defective, in not having gone on to show that the defendant had abandoned the con-

(a) 3 Stark. 175.

(b) 1 Ad. & El. 40.

(c) 5 M. & W. 83.

tract. If a bill of exchange or promissory note has been given in payment of the price, or of any part of the price, of the thing warranted, the vendor's only remedy is a cross-action for breach of the warranty: *Ad. Con.*, p. 266, ed. of 1856; *Bayley on Bills*, p. 505, last ed.; *Chit. Con.*, p. 109, ed. of 1857; *Mosley v. Richardson*, cited in *Bayley on Bills*; *Fleming v. Simpson (a)*; *Trickey v. Larne (b)*.

E. T. 1859.
Queen's Bench.

BURKE
v.
BYRE.

S. Ferguson (with him *Macdonogh*), contra.

It is true that, when a man elects to act upon a contract, with his eyes open, with knowledge of his position, and with liberty of action, in such a case he will not be allowed to adopt so much of the contract as he considers beneficial to him, and to repudiate the rest; but that is not so here; the defendant was deceived by the representations of Creagh, nor had he any means of ascertaining the truth or falsehood of those representations. The notes to *Cutter v. Powell (c)*, in which *Strut v. Blay (d)* is cited, establish that, where an article is warranted, and does not answer the description warranted, the vendee may either bring a cross-action for breach of the warranty, or, in an action brought against him by the vendor, use the breach of warranty in reduction of damages. It cannot be said that the defendant has waived the fraud; for, as a contract tainted with fraud is void *ab initio*, it is incapable of ratification; and, even if it were open to the defendant to ratify it, and he had done so, the plaintiff should have relied upon such ratification by a replication. Where there is such fraud as vitiates the contract, there being no consideration for the bill of exchange or promissory note, the amount secured thereby cannot be recovered: *Solomon v. Turner (e)*; *Hill v. Gray (f)*; *Fleming v. Simpson (g)*. The plaintiff took this promissory note with notice of the fraud; that is admitted by the demurrer; and to hold him entitled to recover in this action will be, in effect, to allow him to take advantage of his own fraud.

(a) 1 Camp. 40, n.

(c) 2 Sm. L. C. 22, 4th ed.

(e) 1 Stark. 51.

(g) *Supra*.

(b) 6 M. & W. 278.

(d) 2 B. & Ad. 456.

(f) 1 Stark. 434.

E. T. 1859.
Queen's Bench

BURKE
v.
EYRE.

R. Armstrong, in reply.

The plaintiff is a holder for value, without notice of the alleged fraud. No fraud is charged with respect to the indorsing of the note to the plaintiff. The defence states that a misrepresentation was made by the payee of the note, as to the amount of rent due upon the lands affected by the statutable mortgages. That, however, was a matter of title, into which the defendant had the means of inquiring. Where fraud is charged, the facts constituting it must be specifically stated; it is not sufficient to allege it generally. Here the matter was quite as much within the knowledge of the defendant as it was within that of *Creagh*. In *Chit. Com.*, p. 537, ed. of 1857, the law is thus laid down:—"It may now be regarded as settled, that a misrepresentation as to a fact, the truth of which a party or his agent has an opportunity of ascertaining, or the concealment of a matter which an individual possessed of ordinary sense, vigilance or skill, might discover, cannot constitute fraud." If fraud has been practised upon the defendant, he may obtain redress by an action for the injury he has sustained by that fraud. A total failure of consideration is a good plea in bar; but a defence like the present, which does not show any repudiation by the defendant of the contract upon the discovery of the alleged fraud, affords no answer to the present action.

LEFFROY, C. J.

We are all of opinion, in this case, that the demurrer taken to the defence is good, and must be allowed. This is an action brought by the indorsee of a promissory note, against the maker, to which a defence has been put in, consisting of and relying upon two grounds, neither of which constitute any legal answer to the demand of the plaintiff. The first ground is an attempt to raise a defence upon a partial rescinding of the contract, whereby the defendant, so far as he was concerned, seeks to enjoy all the benefit of the contract which, from the outset, he has continued to enjoy and still enjoys, and, at the same time, to exempt himself from all the liability consequent upon his entering into that contract. The second ground is an attempt to answer a liquidated demand upon a security, by a

plea of unliquidated damages alleged to have been incurred by the defendant, in consequence of the fraudulent suppressions of M. Creagh, and by a species of set-off in a very unusual manner, though not by a plea of set-off properly so called, to answer the plaintiff's action. The facts of the case, as they appear upon the defence, are these:—M. Creagh, being the owner of two statutable mortgages affecting certain lands held in fee-farm, at a yearly rent of £14. 18s. 1d., and the legal estate whereof was also vested in said M. Creagh, who was in actual possession thereof, upon certain trusts, the said M. Creagh proposed to the defendant to sell, and the defendant, on the representations thereafter mentioned, agreed to purchase the said statutable mortgages for a sum of £200. That upon the treaty for such sale, the said M. Creagh falsely and fraudulently represented to the defendant that all the rent of said lands had been paid, whereas, in truth and fact, there was, to the knowledge and by the default of the said M. Creagh, an arrear of said rent for five years and upwards, due and unpaid, and for which proceedings in ejectment for non-payment of rent had, to the knowledge of the said M. Creagh, been lately threatened, but which facts of the rent being in arrear and the proceedings being threatened, the said Michael Creagh fraudulently suppressed and concealed from the defendant. The defendant then goes on to aver that, the better to deceive him and to prevent his making inquiries in that behalf, the said M. Creagh falsely and fraudulently represented to the defendant that another person was ready to give a sum of money, more than their value, for the lands. As to this averment, it was very properly passed over in the argument, there being no principle upon which such a representation as that, whether true or false, could, by possibility, affect the validity of the contract. The defendant then alleges that, being deceived by these representations, and being in ignorance of the existence of any arrear of rent, he purchased the said statutable mortgages, and, in part payment of the price thereof, paid to the said M. Creagh the sum of £100 in cash, and in payment of the residue, being so deceived as aforesaid, passed to him the promissory note in the summons and plaint mentioned, which was wholly void by reason of said fraud; and

E. T. 1859.
Queen's Bench

BURKE
v.
RYEE.

E. T. 1859.
Queen's Bench.

BURKE
v.
EYRE.

that after the passing thereof the defendant was, for the first time, apprised of the existence of an arrear of rent, for which proceeding in ejectment had, shortly after said sale and purchase, been instituted by the lessors; and that, in order to redeem said land, the defendant paid the arrear of rent and costs, which were more than the amount of the said promissory note and all interest thereon, and that, by reason of the existence of said arrear, the value of the defendant's said mortgages had been lessened by more than said last-mentioned amount. The defence then concludes thus:—"And the defendant further says that the said promissory note was not indorsed to the plaintiff until long after the same was overdue and dishonored, and long after the said several facts above mentioned had occurred and taken place; and that the present plaintiff became indorsee of said promissory note, with full notice and knowledge of the premises, and every of them." Now the matter stands just in the same situation as if the plaintiff had been a party to the original contract between M. Creagh and the defendant; and the question now is, whether the partial failure of the consideration is to be a ground for the rescinding of the contract? The result of the facts, as stated in the defence, appears to be a mere matter of calculation. The arrear of rent which the defendant had to pay was for five years, at about £14 a-year, making £70; he also paid £100 in cash, making the amount paid in cash £170. The sum which he agreed to pay for the mortgages was £200. These mortgages are, accordingly, conveyed to him, and, by virtue of this conveyance, he is, at this moment, in possession of property worth, at his own estimation, £200; and thus, not having paid the £200 (which was the purchase-money), but having paid, upon the face of his own showing, only £170, he yet seeks to withhold the payment of the residue of the purchase-money, although he took the benefit of a contract admittedly worth £200. It is quite clear, therefore, upon the defendant's own showing, there has been no such thing as a total failure of consideration. There is no allegation, on the part of the defendant, of the existence of any warranty in the conveyance or elsewhere, as to the amount of rent due in respect of these fee-farm lands, so as to

enable him to avail himself of the doctrine of warranty, for the purpose of rescinding the contract. The amount of the allegation in the defence is, that misrepresentation was made; and we know that the only effect of misrepresentation is, that it entitles the party who has acted upon it, and is injured in consequence of so doing, to recover damages from the person making the representation, for his want of correctness in the representation so made by him; but, the misrepresentation has not the effect of a warranty, the breach of which may, of course, be taken advantage of, for the purpose of rescinding the contract. There is nothing, therefore, upon the face of this defence, which entitles the defendant to say that the entire contract has been rescinded; nothing to entitle him to say that the contract is void. No doubt, it was voidable, by reason of the misrepresentation, and the defendant might have brought his action for what, as far as it goes, may be called a fraud—for every misrepresentation is, to a certain extent, a fraud—but still it is not such a fraud as will rescind the entire contract. It is a matter which only entitles the defendant to recover damages to the extent to which he has been injured by the fraud; but it is quite impossible to say that it is such a fraud as entitles him to rescind the contract so as to avoid paying the purchase-money, and yet, at the same time, to remain in possession of the property. It is contended, upon the authority of the cases which have been cited, that the party who repudiates a contract must do so altogether, and that any ratification, by him, of the contract, is the subject of a replication. This, however, is not a case which turns at all upon the necessity of repudiating the contract; because, there not being a total failure of consideration, the contract could not be said to be so completely without foundation as to entitle the defendant to consider it a non-existing contract. The attempt to apply to this case the doctrine of the warranty of personal chattels is founded upon a total mistake of the law. It is true that, where there is a warranty of a personal chattel, in an action for the price of it, the defendant may give in evidence, in mitigation of damages, a failure of the warranty; but the authorities are perfectly clear and uniform, that that doctrine is not applicable to a case where

E. T. 1859.
Queen's Bench.

BURKE
v.
BYRN.

E. T. 1859.
Queen's Bench.

BURKE
v.
BYRE.

an independent security is given for the price of the article, because, in an action upon that security, you cannot set off a breach of the warranty. In every view of the case, therefore, and giving the fullest effect to the statements put forward by the defence, the defendant must have recourse to a cross-action founded upon the representation of M. Creagh; and, *non constat* what amount of damages the jury may consider him entitled to in that action; but, it is impossible for the defendant, by a mere allegation that the damage which he has sustained (and which is a mere notional estimate, deduced from a comparison of what the defendant supposes the damage to be) amounts to more than what the plaintiff claims, to answer the clear demand of the plaintiff, on foot of this promissory note, in respect of part and parcel of an unrescinded contract. We are of opinion, therefore, that this defence wholly fails, in every point of view, and that the demurrer must be allowed.

PERRIN and HAYES, JJ., concurred.

T. T. 1859.
Common Pleas.

BARRY v. GLOVER.

(*Common Pleas*).¹

June 4, 6.

THIS was an action of ejectment upon the title, brought to recover possession of a building in College-street, called "The Royal Irish Institution." The defendant pleaded that the possession of the premises belonged to him, and not to the plaintiff; and the issue for trial was, whether the plaintiff was entitled to possession of the said premises on and from the 9th of February 1859, or at any time after said day, and before the present action, which was commenced upon the 12th of February 1859? At the trial of the action, which took place at the Nisi Prius Sittings after last Easter Term, before the LORD CHIEF JUSTICE of the Court of Common Pleas, the plaintiff gave in evidence the following written agreement, which bore date February 4th 1858:—"I hereby propose and agree to take from Alexander Carroll, Esq., the building called 'The Royal Irish Institution,' College-street, from the 15th day of February inst., at the yearly rent of £120 sterling, and agree to pay the said rent monthly in advance; that is to say, £10 sterling on the 15th day of every month; and in case I fail in the punctual payment of said monthly payments, and that any of them shall be in arrear for six weeks after the period at which same ought to be paid, pursuant to this agreement, the said Alexander Carroll, his heirs and assigns, shall be at liberty to re-enter, and take possession of the building, without resorting to any legal process for that purpose. And I enter into this agreement upon the terms that I shall not be disturbed in the possession of the said building for the period of five years, provided I perform the conditions of this agreement in every respect."

(Signed). "J. W. GLOVER."

This agreement was accepted by Alexander Carroll; the defendant.

Certain premises were held under a written agreement, which, after declaring that the rent was to be paid monthly in advance, contained the following clause:—"In case I fail in the punctual payment of said monthly payments and that any of them shall be in arrear for six weeks after the period at which same ought to be paid, pursuant to this agreement, the said A. C., his heirs and assigns, shall be at liberty to re-enter, and take possession of the building without resorting to any legal process for that purpose."

—Held, that this provision merely gave to the lessor a right of re-entry, to enforce which a formal demand of rent was necessary.

Thomas v. Packer distinguished.

T. T. 1859.
Common Pleas.
 BARRY
 v.
 GLOVER.

ant went into possession, and the premises subsequently became vested in the plaintiff as devisee of Alexander Carroll, deceased. The defendant paid the rent up to the 15th of November 1858, the last receipt bearing date December 7th 1858; and, upon the 20th of January 1859, the plaintiff demanded possession, which the defendant having refused to give, the present action was commenced. It was admitted at the trial that no rent had been demanded by the plaintiff or his agent since the 7th of December 1858; and at the close of the plaintiff's case, it was contended by the defendant's Counsel, that, this not being an ejectment under the Ejectment Statutes, it was necessary that the Common Law formalities should have been observed; and that it was necessary, in order to maintain the action, that a formal demand of rent should have been made, in order to give the plaintiff a right of re-entry, under the clause in the agreement relative to the plaintiff's power of resuming possession.

The learned Judge directed a verdict for the plaintiff, reserving to the defendant liberty to move the Court above to have the verdict so found changed into a verdict for the defendant. A conditional order for that purpose having been obtained—

Brereton showed cause.

The tenancy in this case must be regarded as regulated by the terms of the written agreement, which provided that legal formalities might be dispensed with in determining the tenancy, in case the rent should be for six weeks in arrear, as in the case of *Thomas v. Packer* (a).—[MONAHAN, C. J. In that case there was an express provision that the formal demand of rent should be dispensed with].—If this were a mere condition, to the effect that the estate should determine upon non-payment of the rent, a formal demand would be necessary; but the provision in the agreement amounts to a limitation of the estate, viz., that the defendant should be tenant from year to year as long as he paid the rent, and no longer; and under such agreements legal formalities may be dis-

(a) 1 Hur. & Gor. 669.

pensed with: *Doe d. Harris v. Masters* (a); *Doe d. Thomas v. Amey* (b); *Doe d. Davis v. Elsam* (c); *Goodtitle d. Luzmore v. Saville* (d).

T. T. 1859.
Common Pleas.
BARRY
v.
GLOVER.

Macdonogh and *Gernon*, contra.

Thomas v. Packer is distinguishable, for the reasons stated by the LORD CHIEF JUSTICE, on account of the provisions of clause 11 of 8 & 9 Vic., c. 124, under which the lease was executed. This proviso in the agreement must be regarded as a condition; for such an instrument could not create an estate, and therefore could not contain a limitation; and it will be found that similar provisos have been so regarded, and a demand of the rent held to be requisite: *Doe d. Chandless v. Robson* (e); *Doe d. Wilson v. Philips* (f). When there is no proviso for re-entry, there can be no ejectment at Common Law in such cases: *Burrough v. Taylor* (g); 2 *Fur. Land. & Ten.*, p. 1104; *Doe d. Laurence v. Shawcross* (h); *Hudson's Land. & Ten.*, p. 302. The tenant cannot be treated in such a way as to deprive him of what he does not expressly abandon: *Woodfall's Land. & Ten.*, p. 274.

They also cited *Cole on Ejectment*, pp. 412, 414; *Longfield on Ejectment*, p. 251; 2 *Fur. Land. & Ten.*, p. 1077.

Lynch, in reply.

A condition of re-entry may be so framed as to dispense with the necessity of making a formal demand of rent, as in *Dormer's case* (i); *Doe d. Harris v. Masters* (k). This document is not a formal lease, and, therefore, the strict rule applicable to leases reserving rent does not apply; but this is a mere agreement, and does not provide generally that, in case the rent is unpaid, the plaintiff should be at liberty to re-enter, but "in case I shall

(a) 2 B. & C. 490.

(b) 12 Ad. & El. 476.

(c) Moo. & Mal. 189.

(d) 16 Exch. 87.

(e) 2 Car. & P. 245.

(f) 2 Bing. 13.

(g) Cro. Eliz. 462.

(h) 3 B. & C. 756; S. C., 5 Dowl. & Ry. 717.

(i) 45 Rep. 40, b.

(k) *Ante*.

T. T. 1859.
Common Pleas.

BARRY
v.

GLOVER.

fail in the punctual payment," &c.; and such an expression does not amount to a proviso for *cesser* of the estate on default of payment: *per* Mansfield, C. J., in *Smith v. Spooner* (a). Where the power is to re-enter in case the rent be not paid within a certain number of days, and without saying *after demand*, the lessor may enter at any time after default, without a previous demand whoever is in possession: 4 *Jarman Con. Leases*, p. 383, citing *Doe d. Biss v. Horsley* (b). This is the case of a tenancy from year to year, ceasing upon non-payment of rent.—[MONAHAN, C. J. The agreement contains no proviso for *cesser* of the tenancy].

MONAHAN, C. J.

June 6.

We entertain no doubt that this is a condition of re-entry at Common Law. The agreement contains these words, "I agree "to pay the said rent monthly, in advance, that is to say, £10 "sterling on the 15th of every month." This is the ordinary form of covenant which would be inserted in a lease, for the purpose of securing payment of the rent in advance. It then proceeds thus; "And in case I fail in the punctual payment of "said monthly payments, and that any of them shall be in arrear "for six weeks after the period at which same ought to be paid, "pursuant to this agreement, the said Alexander Carroll, his "heirs and assigns, shall be at liberty to re-enter and take possession of the building, without resorting to any legal process for "that purpose." The meaning of this clause is plain, viz., that if the rent be in arrear for a certain number of days, the landlord is to be at liberty to re-enter; and this proviso brings the case within the statute of *Anno*. The clause in question does not provide for *cesser* of the estate in a certain event; it merely grants the right of re-entry to the landlord, upon the occurrence of a certain state of things; and the fact of the rent being payable in advance makes no difference.

The case of *Thomas v. Packer* (c) is altogether different from

(a) 3 Taunt. 252.

(b) 3 Nev. & Man. 567.

(c) 1 Hurl. & Gor. 669.

the present case; it refers to a state of things quite distinguishable from what was provided for in this agreement. We must, therefore, disallow the cause shown against the conditional order; and the rule therefore is, that the verdict found for the plaintiff be changed into a verdict for the defendant.

Rule accordingly.

T. T. 1859.
Common Pleas.

BARRY
v.
GLOVER.

HARGREAVE v. MEADE.

June 9.

TRESPASS *quare clausum fregit*.—The summons and plaint alleged that the defendant broke and entered a walled-in yard of the plaintiff, and broke down and damaged certain walls, and took and carried away certain bricks and other materials, and converted to his own use bricks, mortar and materials, part of the walls of the plaintiff.

The summons and plaint also contained a count in case, for injury to the plaintiff's reversion.

The defendant pleaded that, before and at the time of the alleged grievances, the defendant was the lawful owner, by purchase from the Commissioners of Public Works in Ireland, of certain old messuages, walls and buildings adjoining and abutting upon the close of the plaintiff, with liberty and authority from the said Commissioners to pull down the said messuages, walls and buildings, whereof he, the defendant, was owner, and to carry away the materials; that the walls of the plaintiff's close were then ancient, dilapidated, and not properly or sufficiently bound in or tied together; and that the defendant then, by virtue of his said ownership, and in exercise of his authority, as aforesaid, did pull down the messuages, walls and buildings purchased by him, and, in the course of so doing, did quietly and harmlessly enter upon the said

To an action of trespass, *q. c.* *f.*, for breaking down certain walls of the plaintiff, the defendant pleaded that he was possessed of certain walls abutting upon the walls of the plaintiff; that the walls of the latter were ancient and dilapidated, and not properly bound together; that the defendant did pull down his own walls (as he lawfully might), and in so doing did harmlessly enter the plaintiff's close, and slightly commit the alleged grievances, but that the committing of the said grievances took place of necessity, in the lawful discharge of the defendant's

right, and with all due and reasonable care, and by reason of the condition of the defendant's walls, and by his negligence and default.—*Held*, an insufficient defence to the action.

T. T. 1859.
Common Pleas.

HARGREAVE

v.

MEADE.

close of the plaintiff, and did slightly and temporarily commit the alleged grievances, excepting the taking and carrying away and conversion therein alleged; but that the committing of the said grievances took place of necessity, in the lawful and reasonable exercise, with all due and reasonable care and skill, on the part of the defendant, of the defendant's right in the premises as aforesaid, and took place also by reason of the condition of the walls of the plaintiff's close, as before described, and by his negligence and default; and that the defendant did, without delay, repair and amend the injury and damages caused by the said grievances, and, in so doing, did, of necessity, take, carry away and convert to his own use certain small quantities of bricks, mortar and materials, part of the plaintiff's close, for the purpose of repairing and amending the same, with new materials of the defendant.

Demurrer to this defence, for not stating any facts grounding the alleged right of the defendant, or creating the alleged necessity to do the acts complained of.

S. Ferguson, in support of the demurrer.

The defence does not state upon what grounds the acts complained of were committed, which is requisite: *Mure v. Kaye* (a) nor does it show authority for the trespass: *Stephen on Pleading* 6th Rule, citing *Co. Lit.*, 288; *Com. Dig., Pleader, E*, 17; *Common Law Procedure Act 1853*, s. 56. The defendant merely says that the grievances took place "of necessity;" but states no facts to show the nature or cause of that necessity; and it is not sufficient to plead an inference of law: *Brown v. Mallet* (b); *Parnaby v. The Lancaster Canal Company* (c); *Priestly v. Fowler* (d); and he was bound to observe the rule "*sic utere tuo ut alienum non laedas*:" *Granger v. Finlay* (e). The dilapidated condition of the plaintiff's messuage was no excuse for the trespass: *Dodd*

(a) 4 Taunt. 34.

(b) 5 C. B. 599.

(c) 11 Ad. & Ell. 223.

(d) 3 M. & W. 1.

(e) 7 Ir. Com. Law Rep. 417.

Holme (a). He also cited *Broom's Legal Maxims*, p. 10; 1 *Saund.*, T. T. 1859. 346 a, citing *Patrick v. Greenway*.

Common Pleas.

HARGREAVE

v.

MEADE.

Philips, in support of the pleading.

The defendant alleges that, in the course of pulling down his own house, he did a little enter the close of the plaintiff, and that of necessity.—[CHRISTIAN, J. Do you mean to contend that if you are possessed of a house, and cannot pull it down without doing the same to your neighbour's house, that you have a right to do the latter act, in pulling down your own house?—The state of the plaintiff's premises was the cause of what occurred, and it is so alleged; his passive negligence is the defendant's excuse.—[MONAHAN, C. J. Is there any authority to show that the ruinous condition of the plaintiff's house afforded the defendant any excuse?—*Beavan v. The Mayor of Manchester* (b) is an authority for that proposition.

MONAHAN, C. J.

You do not plead a single fact in support of your alleged right. Allow the demurrer.

Demurrer allowed.

(a) 1 Ad. & Ell. 493.

(b) 8 Ell. & Bl. 44.

M. T. 1859.
Common Pleas.

M'MAHON v. ELLIS and others.

Nov. 2, 3.

In an action for the disturbance of the plaintiff in the office of weighmaster of the town of C., under the 4 Anne, c. 14 (*Ir.*), the defendant pleaded that the plaintiff had not taken the oath required by the Act, nor had taken the oath nor subscribed the declaration required by the Roman Catholic Relief Act; and he also obtained from the Court an order under the Common Law Procedure Amendment Act 1856, that the plaintiff should answer certain interrogatories. The interrogatories exhibited by the defendant were, as to

THIS was a motion for an attachment against the plaintiff, for refusing to answer certain interrogatories. The action was for the disturbance of the plaintiff in his office of weighmaster, under 4 Anne, c. 14 (*Ir.*) of the town of Clones. For the pleadings in the cause, see vol. 4 p. 16.—The defendants pleaded, *inter alia*, that plaintiff did not take the several oaths, or any of them, directed to be taken by the statute of the 4 Anne. On the 8th of January 1859, the plaintiff was ordered, upon motion on the part of defendants, to answer the following interrogatories in writing, by affidavit, to be sworn and filed in the usual way:—First.—Did the said Sir Thomas Barrett Leonard, Bart., administer to plaintiff the oath required by the 3rd section of the statute of the 4 Anne, c. 14, to be taken by weighmasters appointed under said statute; and, if so, where and when did he administer said oath to plaintiff, and was any person, and who, present, when said oath was administered, and was any entry or memorandum made, respecting the administering and taking of such oath, and where is such entry or memorandum at present?

Second.—Did any person other than Sir T. B. Leonard administer said oath to plaintiff, prior to the 22nd day of January 1853; and whether the plaintiff had taken the oaths and subscribed the declaration in question? and also, whether he was a member of the Roman Catholic religion? The plaintiff filed an affidavit, submitting that he was not bound to answer the interrogatories, upon the ground that they were exhibited with a view to obtain a discovery as to how he intended to make out his title to the office. Upon a motion to attach the plaintiff for refusing to answer, it was further insisted, on his behalf, that the answers to the interrogatories might tend to expose him to criminal proceedings, for having acted in the office without having taken the qualifying oaths.—*Held*, that, irrespective of the question whether the discovery sought for would, under any circumstances, have been obtainable, it was a valid reason for declining to answer, that the plaintiff apprehended that his answers might tend to criminate him.

Held also, that this ground of objection might be insisted on at the hearing of the motion, without having been specifically stated in the affidavit.

Held also, that the plaintiff was also entitled to decline answering the interrogatory as to whether he was a Roman Catholic, as this question was a link in the chain of the other inquiry.

if so, where and when was said oath so administered, and by whom, and was any person or persons present when said oath was so administered? &c., &c.

M. T. 1859.
Common Pleas.

M'MAHON

v.

ELLIS.

Third.—Did the plaintiff ever take the oath of supremacy, directed to be taken by the 9th section of said statute of 4 *Anne*?

Fourth.—Is the plaintiff a member of the Roman Catholic religion, and has he been such from the said year 1844 to the present time?

Fifth.—Did the plaintiff, within three calendar months next before the alleged appointment to, or his alleged entering upon, the exercise and enjoyment of the office of weighmaster of Clones, take and subscribe the oath directed by the statute of the 10 *G.* 4, c. 7, to be taken by all persons professing the Roman Catholic religion, before their entering upon the exercise or enjoyment of any office under the Crown, or any other offices or franchises, at any of the places appointed by said statute for the taking and subscribing of said oath, and at which of those places, and at what time, and before and in presence of whom, did he so take and subscribe said oath?

The plaintiff, in his affidavit, stated that he objected to answer the interrogatories, and submitted that the several interrogatories were administered to deponent to obtain a discovery relating to plaintiff's title to the office of weighmaster, and to discover how he intends to shape his case in respect of, and to make out, his title to said office, and of the evidence whereby the same is to be established, so far as same relates to the several interrogatories. Deponent submitted that defendants were not entitled to any discovery, as to the matters in said interrogatories.

Joy (with whom were *Ellis* and *Coates*), in support of the motion.

The defence pleaded by the defendants involved a negative; the real state of facts being and lying within the knowledge of the plaintiff. It is no objection, therefore, that the interrogatories referred to his title. The object of these is to sustain the case of the defendants; and the discovery sought for is consistent with

M. T. 1859.
Common Pleas.

M'MAHON
v.
ELLIS.

1

the English authorities: *Flitcroft v. Fletch-
berts* (b); *Whateley v. Crowter* (c). A bill of
time of Lord Hardwicke, has been held main-
of a defendant in ejectment, to discover the title
to recover the estate: *Metcalf v. Hervey* (d).

Macdonogh and *E. M. Kelly*, contra.

These interrogatories are objectionable on three
It is sought to discover how the plaintiff means to
That discovery is not legitimate, except in the case
on the title. The discovery should be in aid of an
set up by the defendant: *Wigram on Discovery*, p.
v. Wakefield (e); *Ward v. Lloyd* (f); *Joy v. Keh*
condly.—The interrogatories are objectionable upon the
the answers to the questions might expose the plaintiff
indictment for a misdemeanour, in having acted in the
weighmaster without having taken the oaths required by
4 *Ann.*, c. 14, s. 9, and the 10 *G.* 4, c. 7, ss. 19 and 21
P. C., p. 25; *Fisher v. Ronalds* (h). Thirdly.—The answers
tend to create a forfeiture of the office; and the plaintiff
therefore, bound to answer them.

Ellis, in reply.

The Common Law Procedure Act intended that the
examination by interrogatories should be co-extensive with
viva voce evidence. The plaintiff has not sworn in his
that he is apprehensive that his answers might tend to
him.—[MONAHAN, C. J. Can you refer us to any case in
has been held that the party must pledge his oath to the fact
it appears on the face of the interrogatories that the answers
have that tendency?—The Annual Indemnity Act would

(a) 11 Exch. 543.

(c) 5 Ell. & Bl. 709.

(e) 6 Ell. & Bl. 463.

(g) 2 Ves. 679.

(b) 3 C. B., N. S., 8.

(d) 1 Ves. sen. 248.

(f) 3 Exch., N. S., 3.

(h) 12 C. B. 762.

M. T. 1859.
Common Pleas.

M'MAHON
v.
ELLIS.

plaintiff, instead of answering the interrogatories, has filed an affidavit, in which he submits that he is not bound to answer them; and that the defendant is not seeking a discovery of his (the defendant's) case, but is endeavouring to make out how the plaintiff means, at the trial, to prove his (the plaintiff's) case; and that, according to the well-known rule of Courts of Equity, the defendant is not entitled to such discovery. But it has been also insisted by plaintiff's Counsel, during the argument, though no such point is suggested by the affidavit, that plaintiff is not bound to give the required information, as being such as could be used against him on a criminal charge. As it is on this latter view of the case that we are about disposing of the present motion, it will be advisable that I should state distinctly the grounds on which we proceed. The defendants, having relied on the not taking of the oaths and subscribing the declaration required by the 9th section of the Act, as a defence to plaintiff's action, we must at all events, for the purpose of this motion, assume that the defence so pleaded is a valid one; from which it follows that, if the plaintiff has acted as weighmaster, without having taken the prescribed oaths and signed the prescribed declaration, he has violated the 9th section of the Act; and, if he has, which is of course the case sought to be proved by the defendants, it occurs to us that he has committed a misdemeanour, and is therefore not bound to answer any questions, or give any information, tending to establish as against him such misdemeanour. At all events, we are of opinion that, in an interlocutory proceeding, such as this, from which the plaintiff would have no appeal, we ought not to decide against him, more particularly as, by the defendant examining the plaintiff as a witness at the trial, he will have an opportunity of asking the same questions; and I shall probably consider it right to rule that the plaintiff is not bound to answer; in which case the defendant, by excepting to my ruling, will have an opportunity of having the propriety of our opinion considered by a Court of Appeal. With respect to the objection that plaintiff should, by affidavit, have stated the ground for excusing himself from answering, we are quite aware that such a rule properly exists, where the objection does not appear from the interrogatories *per se*; but we

do not think that any such rule should or does exist where the interrogatories are exhibited in support of a pleading, the object of which is to show that the misdemeanour has been committed; and we are of opinion that the protection extends as well to the question whether the plaintiff is a Roman Catholic, as being a link in the chain, as to the other questions. On the whole, therefore, we are of opinion that the present application should be refused.

M. T. 1859.
Common Pleas,
M'MAHON
v.
ELLIS.

SMITH v. EARL OF HOWTH and another.

Nov. 3, 4, 5.

THIS was an action of trespass, for breaking and entering a forge and quarry of the plaintiff, at Howth, in the county of Dublin. The summons and plaint also contained counts for assault and trover, and conversion of quarrying-tools and quarried stones. The principal issue upon the pleadings was, whether the plaintiff was lawfully possessed, as against the Earl of Howth, of the forge and quarry in the pleadings mentioned? At the trial, before MONAHAN, C. J., at the Sittings after last Hilary Term, there was given in evidence, on behalf of the plaintiff, a document purporting to be a memorandum of agreement relating to the quarry, dated the 19th of May 1855, which was in the following words:—"We propose to take from the Earl of Howth the right "of quarrying green whinstones on the Hill of Howth, for the "repairs of the streets of Dublin, and to pay a royalty of three "pence per ton, for a term of three years from this date. We "undertake to raise ten thousand tons of stones every year, provided the Corporation require same; and, in case our contract "with them does not continue, and that a further supply of stones

A proposal in writing was made by A and B to D, to take the rights of quarrying whinstones on the Hill of H., and to pay a royalty of three pence per ton, for a term of three years, and was verbally accepted. A and B, having subsequently quarrelled, the former took C into partnership, and proceeded to work the quarries. A subsequently surrendered his interest to D. A notice to quit having been served on C by B and D, they, before the expiration of the three years,

entered the premises, and expelled C.—*Held*, that, assuming that a term for three years had been created by parol, D, by the surrender of one of the co-tenants, became a tenant in common with B, and they were entitled to expel C, who had not, by reason of the partnership, acquired any interest in the land.

Held also, that, taking the agreement not to have operated as a demise of the land, but merely as a license to quarry, it was revocable at the pleasure of D.

M. T. 1859. "is not required, this agreement is to cease; and we are not to
Common Pleas. "have any further right or claim to such quarries; his lordship
 SMITH "is not to let the right of quarrying green whinstones on the
 v. "Hill of Howth to any other party during the continuance of
 HOWTH. "this agreement.

"Dated this 19th of May 1855. (Signed) "CHARLES ATKINS
 "PATRICK HARMAN"

The action was commenced in May 1857, before the expiration of the three years. The plaintiff in his evidence stated that, in the year 1855, he became acquainted with the quarries on the Hill of Howth, and that in 1856, in the course of a casual conversation with Atkins, a verbal agreement was entered into between them for a partnership, in supplying the Corporation of Dublin with stone and working the quarries for this purpose. In February 1856, the plaintiff entered into possession of the quarries, but merely as agent; but afterwards worked the quarries under the partnership agreement, and continued in possession until expelled by the defendants. He expended a large sum of money in cash on the quarries, and worked them continually while in possession, and supplied stones under a contract entered into with the Corporation of Dublin. He also stated that Mr. Hamilton, Lord Howth's agent, said that he was aware of his working the quarries, and had applied to him for rent or royalties. Atkins had left the country in 1856. The plaintiff admitted that he had received notices demanding possession. Counsel then for the defendants submitted that the action should have been on the case, and not trespass, inasmuch as the plaintiff's rights, if any, were not corporeal but incorporeal; also, that the agreement of 1855, not being under the seal of Lord Howth, conveyed no legal right; and, therefore, on both these grounds they called upon the learned CHIEF JUSTICE to nonsuit, or direct a verdict; which his Lordship, at that stage of the case, refused; but gave leave to apply to the Court to do so. The defendant then went into his case, and examined Harman, who proved that he had quarrelled with Atkins, relative to the agreement made between them, and the result was, that he omitted witness's name in his proposal to the Corporation; and, at the time of Atkins leaving the country, witness had a Chan-

cery suit pending against him. Evidence was also given of the execution by Atkins of a surrender, dated the 18th of December 1856. At the close of the defendants' case, his Lordship stated his opinion that, even if a legal interest passed to Harman and Atkins, under the agreement of 1855, still that no legal estate in the premises vested in the plaintiff, by the agreement between him and Atkins to carry on a partnership; and that Atkins having surrendered his interest to Lord Howth, he and Harman were justified in putting out the plaintiff. Each party required the learned CHIEF JUSTICE to direct a verdict in his favour; but his Lordship directed a verdict for the defendants, on the grounds stated, reserving, with the consent of the parties, leave for the plaintiff to have a verdict entered for him for nominal damages, in case his Lordship should have so directed. In the following Easter Term, a conditional order was obtained by *Ball*, to set aside the verdict, and that a verdict should be entered for the plaintiff for nominal damages, pursuant to leave reserved, or that a new trial be had, on the ground of misdirection.

M. T. 1859.
Common Pleas.
SMITH
v.
HOWTH.

Macdonogh (with whom was *W. O'C. Morris*) showed cause.

This was a mere license by parol, and was revocable at the pleasure of the grantor. It created no title to the lands, not being under seal: *Wood v. Leadbitter* (a); *Hewlins v. Shippam* (b). If it be said that the proposal being accepted by parol created a tenancy between the parties, the answer is, that there is no evidence to show that it was at a rack-rent, so as to take the case out of the Statute of Frauds.

Ball and *Sullivan*, contra.

The principle contended for at the other side is not universal. License, even by parol, is not revocable, after expense has been incurred, in consequence, by the licensee; as, for example, by the erection of machinery upon the land, for the purpose of quarrying: *Webb v. Paternoster* (c); *Wood v. Lake* (d); *Liggins v. Inge* (e);

(a) 13 M. & W. 838.

(b) 5 B. & C. 221.

(c) Pal. 71; S. C., Roll. 14, 152; S. C., Pop. 151.

(d) Sayer, 3.

(e) 7 Bing. 682.

M. T. 1859. *Winter v. Brookwell* (a). Again, this was a good demise by parol for a term of three years, the surface of the ground being necessary for the purpose of quarrying: *Bac. Ab., Leases, K; Daniel v. Grace* (b). No such point as that of the rack-rent was made at the trial. If it had been suggested, evidence might have been given to prove that the royalty reserved, which was in the nature of rent, was such improved rent as satisfied the Statute of Frauds 7 W. 3, c. 12, s. 1 (*Ir.*).

Common Pleas.

SMITH

v.

HOWTH.

Morris, in reply.

MONAHAN, C. J.

Nov. 5.

We are of opinion that there are no grounds for setting aside the nonsuit which I directed in this case. The first point insisted on by plaintiff's Counsel is, that the proposal of the 19th day of May 1855, having been verbally accepted or acquiesced in by Lord Howth, or his agents, a legal estate or tenancy has been created in the soil of the quarries, in Atkins and Harman. In answer to this, defendants' Counsel suggested that there was no evidence of the rent proposed to be reserved by the document in question being a rack-rent, and, therefore, that such an interest could not be created by parol. In answer to this objection, it is enough to say that no such point was made at the trial; and we should not allow it to be made now, being satisfied that, had it been made at the trial, evidence could have been given that the rent or render was supposed to be the full value. But, though this is so, we do not consider it necessary to decide on the construction of the instrument, whether what was proposed for was an estate in the quarries, as a corporeal hereditament, or merely an incorporeal right to work them; as even if we yield to the argument of plaintiff's Counsel on this point, still we are clearly of opinion that, even though Atkins had a legal estate jointly with Harman in the soil of the quarries, still that the agreement between Atkins and the plaintiff, as deposed to by the latter, namely, that Atkins and he should be in partnership for

(a) 8 East, 310.

(b) 6 Q. B. 145.

working the quarries, did not transfer to or vest in the plaintiff any legal estate in the quarries; and therefore, that, on Atkins surrendering his interest to Lord Howth, his lordship and Harman became tenants in common of the quarries, and were entitled to put out the plaintiff Smith. But if, on the other hand, the true construction of Atkins' and Harman's proposal is, that what they proposed for was not an estate in the quarries as a corporeal hereditament, but an incorporeal right to work them, it is clear that the parol acceptance or assent of Lord Howth or his agent could not operate as a grant, or more than a license, which is in its nature revocable; and if not surrendered to Lord Howth by Atkins, it has been clearly revoked by his lordship. But then it has been argued by the plaintiff's Counsel, that, though a license is generally revocable, that it ceases to be so when acted on and expense incurred on the faith of it; and some cases have been referred to on that point. We do not think it necessary to stop to inquire whether any such case could have been made at the trial. The plaintiff said something of having expended a considerable sum, £100 or £150, in working the quarries; this he stated as an excuse for having never paid a sixpence on foot of the rent to which he was liable. I was not asked to leave any question on the subject to the jury; and I have no doubt that, if any such case had been suggested, the jury would not have been of opinion that any such sum had been expended, so as to bring the present case within the rule insisted on by the plaintiff's Counsel; and, therefore, it is unnecessary to consider whether there is any foundation for the startling proposition that, if a man has a license in its nature revocable, to work another man's quarry, that, by expending a small sum of money in the working the quarry, he can convert a revocable license into what would be in effect an irrevocable right or estate in perpetuity. I, for one, would require much argument to induce me to accede to such a proposition. Our rule, therefore, will be to allow the cause shown against setting aside the verdict for defendants.

M. T. 1859.
Common Pleas.
 SMITH
 v.
 HOWTH.

M. T. 1859.
Common Pleas.

DOBBIN v. AIKIN.

Nov. 4.

Where a ticket under the 3 and 4 Vic., c. 91 (Linen Act), contained a special clause that the whole of the cloth must be returned within five weeks from date, or 1s. 6d. to be deducted for every week longer kept:—
Held, that though such an agreement was not in terms contemplated by the 16th section of the Act, it was not opposed to its policy; and that where the employer had been summoned before the Petty Sessions for the wages stipulated in the ticket, he was entitled to set off the penalty for delay.

THIS was an appeal under the 20 & 21 Vic., c. 43, s. 2, from a decision of the Magistrates of the Petty Sessions of Newtownards, in the county of Down. It appeared, by the special case, that the respondent obtained from the appellant (who is the agent in the town of Newtownards for J. J. Mair and Co., cotton manufacturers in Glasgow) a muslin web to be woven, on certain specified terms set forth in what is called "the ticket" which the manufacturer or agent is bound by the Linen Act, 3 & 4 Vic., c. 91, s. 16,* to deliver to every weaver, with the warp, at the time it is given out to be woven. The summons was for 6s. 4d., balance of wages due to the respondent for weaving a web. Of this sum 1s. 4d. was admitted to be due, and was duly tendered to complainant, but the remaining 5s. was kept as a fine or set-off for detention of work, being a halfpenny per ell on the whole web of 120 ells. The ticket produced was not in exact conformity with this section of the Act, the price having been named by the ell instead of the yard; but, as no exception was taken to it on that score, the Magistrates confined themselves to the point in dispute. The time allowed for finishing the web was five weeks. It was, however, nine weeks and three days before the last cut or portion was brought in; so that, allowing eight days of grace, according to the 18th section of the Act, the web was detained above three weeks beyond the stipulated time. The Magistrates were unanim-

* NOTE.—3 & 4 Vic., c. 91, s. 16:—"That with every warp given out by a manufacturer or agent, to be woven, there shall be delivered a note or ticket, signed by such manufacturer or agent, delivering out the same, stating the length, breadth, particular fabric and denomination of the work to be performed, the number of shots of weft, under the glass, which it is to count out of the loom, the time in which the said work is to be finished and returned, and the price, in sterling money, agreed on for executing each yard, imperial standard measure of thirty-six inches of such work, in a workmanlike manner," &c.

mously of opinion that the conditions subjoined to the ticket given to the complainant* were calculated to supersede the power of the Court of Petty Sessions to maintain and award the amount of penalty for the failure, by complainant, to complete the web within the time agreed on. The appellant relied on the validity of the condition appended to the ticket to deduct the full penalty specified therein, but the Magistrates considered that they were precluded from entering into the question of compensation for loss and damage caused by detention, and felt obliged to decide in favour of the complainant for the full amount claimed. With regard to the arbitration clause, the Magistrates considered that, before either party could be bound to abide by arbitration, the Magistrates themselves should, according to the Arbitration Act (a), have heard the cause of complaint, and decided whether it was a subject for arbitration or not; and that the condition on the back of the ticket was in direct contravention of the meaning and intent of the Act.

M. T. 1859.
Common Pleas.

DOBBIN
v.
AIKIN.

A. Closs (with whom was *W. J. Sidney*), for the appellant, contended that the clause providing for deductions was not inconsistent with the 16th section of the 3 & 4 *Vic.*, c. 91. By section 17, if the ticket were not in conformity with section 16, the manufacturer was deprived of the power of proceeding under section 18 against the weaver for the statutable penalty, but that did not preclude his right to insist upon the stipulated penalty by way of set off. The arbitration clause in the ticket takes the case out of the ordinary course.

(a) 5 *G.* 4, c. 96.

* NOTE.—The ticket given to the weaver contained the following clauses :—
“The whole of the cloth must be returned within five weeks from date, or 1s. 6d. will be deducted for every week longer kept. If not finished within five weeks to be paid 4½d. ; if kept six weeks 4d.”

The following agreement, on the part of the weaver, was indorsed :—“I agree to submit to arbitration any difference between my employers or their agent, Mr. William Dobbin and myself, which may arise in the working of this web; and I take it subject to this and all the other conditions printed or written upon this ticket, or upon the paper of directions accompanying it.”

(Signed) “WILLIAM AIKIN, Weaver.
(Witness) “SAMUEL PHILIP.”

M. T. 1859.
Common Pleas.

DOBBIN
v.
AIKIN.

W. Andrews and *H. Law*, contra.

The Act was intended for the mutual benefit of the manufacture and the weaver. The 18th section provides a remedy in case the work should not be finished and returned within eight days of the time agreed on. If the ticket is not given in the particular form given by the Act, the case becomes an ordinary case of wages. The special clause is opposed to the policy of the law, and cannot be enforced: *Cundell v. Dawson* (a); *Little v. Poole* (b); *Cope v. Rowlands* (c); *Ferguson v. Cristall* (d); *Tyne v. Thomas* (e); *Watts v. Friend* (f). The contract is also illegal inasmuch as the price is not reserved by the imperial yard, but by the ell: 5 G. 4, c. 74, ss. 2, 15. Either the particular clause in the contract becomes void and should be rejected, or the entire contract is vitiated, and the claim would be for ordinary wages.

W. J. Sidney, in reply.

The Court is precluded from entering into the consideration of the question regarding the measure by which the price was reserved. We do not dispute the validity of the contract, but if the entire contract be invalid, the claim for wages could not be sustainable, but the party could only sue upon a *quantum meruit*.

MONAHAN, C. J.

We do not entertain any doubt whatsoever, upon the portion of this case relating to the construction of the Linen Act. We are satisfied that there is nothing in it which prevented the parties entering into a special contract in relation to the price to be paid, in case the work was not done in the time agreed on. The effect of a variation from the terms of the Act was merely to disentitle the employer to avail himself of its provisions; but there was nothing to render the contract void or objectionable in any other respect. This is the only point submitted for our

(a) 4 C. B. 376.

(b) 9 B. & C. 192.

(c) 2 M. & W. 157.

(d) 5 Bing. 305.

(e) M'Clel. & Y. 119.

(f) 10 B. & C. 446.

opinion. But then the question arises, as to what order we ought to make upon the present appeal. It is contended that the respondent having made only this point at the hearing below, it is not open to him now to make another, namely, that arising on the Weights and Measures Act. We can only decide the point which has been raised below, and has been reserved for our decision; and inasmuch as only five or six shillings is in dispute, there is nothing to justify our allowing further litigation. But if other cases arise, this decision will not prevent this other question being raised before the Magistrates, and if necessary brought before us. Therefore, the rule which we now make is, that upon the appellant paying the respondent the sum of 1s. 4d., we shall reverse the decision of the Magistrates, without costs.

M. T. 1859.
Common Pleas.

DOBBIN
v.
AIKIN.

CROFTON v. COLGAN.

Nov. 4, 5.

THIS was an action of contract.—The third count of the summons and plaint alleged that the plaintiff was possessed of a certain race-horse, to wit, a mare called “Lady Emily,” and the defendant was possessed of a certain mare; and thereupon, on the 13th of September 1857, it was agreed by and between the plaintiff and defendant, that the plaintiff should take the defendant’s said bay mare in exchange for the plaintiff’s said mare, “Lady Emily,”

The plaintiff and defendant agreed that the plaintiff should take defendant’s mare in exchange for that of plaintiff; that the defendant should give plaintiff the half of the winnings of

her two first races, or, in case she should be sold before then, the defendant should pay the plaintiff one-third of what she should be sold for.—*Held*, that the above agreement, being one simply to give an increased price for the mare, upon the occurrence of a state of facts which might add to her value, was a legal contract, and not in the nature of a wager.

The defendant’s mare having won a prize of £50 at a horse-race, the conditions of which were that a subscription should be made up of the sum of three sovereigns each, subscribed by the owners of the horses, and a sum of thirty sovereigns added thereto, out of the race fund, out of which the expenses, and a sum of £1. 10s. were to be deducted and paid to the treasurer, and £3. 3s. to the owner of the second horse:—*Held*, that the races referred to in the agreement were to be such as were legal, within the 8 & 9 Vic., c. 109, s. 18, and that the race in question satisfied the requirements of the statute.

M. T. 1859.
Common Pleas.

CROFTON
v.
COLGAN.

and that the defendant should give the plaintiff the half of her two first races won, or, if she should be sold before the above agreement should be fulfilled, the defendant should pay the plaintiff one-third of what she might be sold for; and the plaintiff, in performance of said agreement, delivered the said mare "Lady Emily" to the defendant, and received from the defendant, in performance of the defendant's contract, the said bay mare of the defendant; and afterwards, the said mare "Lady Emily" was for the defendant, and the defendant received the sum of £50 money subscribed to and so won at a certain horse-race, to wit at Banshee, on or about the 22nd or 23rd of February 1858; and the defendant afterwards, and before the said mare "Lady Emily" won any other race, sold her, the said mare "Lady Emily," for £40 yet the defendant has not paid the plaintiff the half of said sum of £50, or any part thereof, neither has he paid the plaintiff the third of the said sum of £40, or any part thereof. The fourth count stated an agreement as above, and the winning of the race by "Lady Emily," and then averred that said mare, before the winning of any other race, was, by reason of having slipped her shoulder, rendered incapable of winning any further race; and although the said mare would sell for £40, the defendant declined and refused to sell, although requested by the plaintiff so to do, and had not paid any part of said winnings to the plaintiff.

The defendant pleaded to the first breach of contract in the third count, that said subscription for said race amounted, in the whole, to £45 sterling, and no more, that said race was not a lawful race, because the whole of said subscription was not awarded or paid in, according to the rules or regulations of such race to be awarded or paid to the winner thereof; and said subscription was made up of a sweepstakes of three sovereigns each, subscribed by the owners of the horses in said race, on account of each horse who ran in said race, and a sum of thirty sovereigns added thereto, out of the race fund, and which together made the sum of £45 sterling; and according to the rules and regulations of said race, all expenses incidental to said race, incurred by the stewards thereof, were to be deducted out of said sum of £45 sterling; and the sum of

£1. 10s., sterling, was, according to the said rules and regulations, to be deducted thereout for the race fund, and paid to the treasurer of said race; and according to said rules and regulations, the sum of £3. 3s., sterling, was to be awarded and paid thereout to the owner of the horse which would run second in said race, and the balance only of said sum of £45, after all deductions and payments, according to said rules, &c., was to be paid and awarded to the owner of the horse which would win said race; that there were five horses in said race, and the owner of the horse which ran second in said race was awarded and paid, on account thereof, the said sum of £3. 3s., sterling, out of said subscription; and said sum of £1. 10s. was deducted thereout, and paid to the treasurer of said race for the race fund; and the expenses incidental to the race amounted to the said sum of £12. 0s. 11d., sterling, which was also deducted out of said subscription and paid to said stewards; and the balance only of said subscription, after making all the aforesaid deductions and payments, amounting, in the whole, to £28. 6s. 1d., was awarded and paid to the defendant, on said account of said mare having won said race; and all said payments and deductions were made according to the aforesaid rules and regulations; and the said mare never won any other race for the defendant. The defendant also pleaded to the first breach of contract in the fourth count, that the said subscription for said race amounted, in the whole, to £45, sterling, and no more; that said race was not a lawful race, because the whole of the said subscription was not awarded or paid according to the rules and regulations of said race to be awarded or paid to the winner thereof; and said race, in the third count, and also in said fourth count mentioned, were and are one and the same race; and the defendant relied on the same defence as pleaded to the first paragraph in the third count.

The plaintiff demurred to the first plea, because the facts stated therein did not show said race to have been an unlawful race, nor was the plaintiff thereby shown to have been a party or privy to the terms or regulations of said race; and because supposing, but not admitting, the said race to have been illegal, as alleged, the defendant, having received the money won at said race, was not at liberty

M. T. 1859.
Common Pleas.
CROFTON
v.
COLGAN.

M. T. 1859. to avail himself of his own wrong in withholding same from the
Common Pleas. plaintiff. He also demurred to the second plea, and assigned the
 CROFTON same causes of demurrer.
 v.
 COLGAN.

Shogog (with whom was *Samuel Ferguson*), in support of the demurrer.

The plea shows that the race won by the defendant's mare was a subscription or contribution, within the 8 & 9 Vic., c. 109, s. 15. The agreement here was not in the nature of a wager, but merely to give an increased price in a certain event: *Irwin v. Osborne* (a); *M'Elwaine v. Mercer* (b); *French v. Styring* (c); *Evans v. Pratt* (d). The defendant ought not to be permitted to avail himself of his own wrong.

M'Mahon and Joy, contra.

The plea shows a good answer to the action, and the agreement set out in the summons and plaint is itself illegal. It was, though colourably a contract of sale, in substance a wager, and is, therefore, void: *Kent v. Bird* (e); *Rourke v. Short* (f). Even though such an agreement were, *prima facie*, legal, the plea shows that the present action is not maintainable, inasmuch as the race was an illegal one. To bring a race within the terms of the provision the entire sum subscribed should go to the winner: *Parsons v. Alexander* (g); *Batty v. Marriott* (h); *Mearing v. Hellings* (i).

Ferguson, in reply.

Rourke v. Short proceeded on an entirely different state of facts. The race here was legal. It is not necessary that the whole of the contribution should go to the winner: *Applegarth v. Colley* (k). Even though the race were illegal, the plaintiff ought to recover, as no illegality was stipulated for: *Pellecatt v. Angell* (l); *Johnson v. Lansley* (m); *Smith on Contracts*, p. 156.

(a) 5 Ir. Com. Law Rep. 404.

(c) 2 C. B., N. S., 357.

(e) Cowp. 583.

(g) 5 El. & Bl. 263.

(i) 14 M. & W. 714.

(l) 12 C., M. & R. 31.

(b) 9 Ir. Com. Law Rep. 17.

(d) 3 M. & Gr. 759.

(f) 5 El. & Bl. 904.

(h) 5 C. B. 818.

(k) 10 M. & W. 723.

(m) 12 C. B. 468.

MONAHAN, C. J.

In this case, the plaintiff being the owner of a racing mare, and the defendant, of a horse of a different description, and not so valuable as the plaintiff's, they agreed to change their horses, for a sum of money, to be paid to the plaintiff at the time, and with a stipulation that, in case the plaintiff's mare should win a race, within a particular period, that half of the amount of the money so won should also be paid to him by the defendant, and that if the mare should not win any race, but should be sold, then, that part of her selling price should be paid to the plaintiff. In the events which followed, the mare did run and win a race, and the plaintiff claims his share of the winnings. The defendant in his defence shows the particular description of the race won, and he contends that, assuming the race contemplated in the plaint to have been a legal one, although the plaintiff might recover a portion of the amount of the stakes run for, in case the race had been a legal one, he cannot recover the proceeds, if an illegal one. It was also contended in the course of the argument, on the part of the defendant, that the original agreement stated in the summons and plaint was illegal, being in the nature of a wager, and which cannot therefore be enforced in a Court of Law. The agreement, taken in connection with the events which have happened, amounts shortly to this:—The plaintiff sells to the defendant a racing mare, for a certain sum, and also half of whatever she shall win within a certain time. We do not think that such a transaction resembles a wager, or is an illegal contract. We think that it is simply an agreement to give an increased price for the horse, upon the occurrence of a state of facts which would add to her value. It would be exactly the same thing, if this had been, instead of a race-horse, either a job-horse or a job-coach, and that the owner had agreed to sell it for £20 or £30 and for one-half of what it would earn within the first six months after the sale. The nature of both transactions appears to us to be substantially the same. We have been referred to the case of *Rowke v. Short (a)*, which, it is said, shows that this transaction

M. T. 1859.

Common Pleas.

CROFTON

v.

COLGAN.

M. T. 1859. is in the nature of a wager. The facts of that case were these:—
Common Pleas.
CROFTON
v.
COLGAN.

The plaintiff sold a lot of rags to the defendant. The plaintiff alleged that the rags were worth 5s. 9d. per cwt.; the defendant alleged that they were not worth so much. There was a difference between the parties about three pence or four pence per cwt. Then a dispute arose about a former transaction in rags, in which the plaintiff said that he had sold the lot at 5s. 9d.; the defendant said 6s., per cwt. Although this transaction had no connection with that for which they were bargaining, they sought to make a wager as to what had passed on the previous occasion; and they came to the following arrangement, namely, that they should go to the keeper of a public-house, and order a gallon of brandy, to be paid for by the unsuccessful party. The question of the price was to be referred to the publican; and, should he come to the conclusion that the plaintiff was wrong, the defendant should only pay 5s. per cwt. for the parcel of rags; but if the defendant were wrong, then that 6s. per cwt. was to be the price. In other words, the price for the present lot was to vary £100, upon an event totally unconnected with its actual value. There was also an allegation in the pleadings that, what the parties intended was, a wager in relation to the price paid on a previous occasion. The Court were of opinion that it was a subterfuge for a wager. We do not question the propriety of that decision; but we do not think that the contract here resembles that one there. We think the transaction we are considering was a fair, and not unreasonable, mode of settling the price to be paid by the defendant for plaintiff's mare. Then, it is said, and we agree with the defendant in this, that we must construe the agreement between the parties as referring to what should be legally won, and not to sums of money won on illegal races or wagers; and the defendant further insists that the race won by plaintiff's mare was an illegal one, and, therefore, not within the contract. This renders it necessary to consider what in fact were the terms of this race. Five persons were to subscribe £3 each on their respective horses, and £30 were to be subscribed by the stewards of the race, making the whole plate £45. But it is said that part of the terms was, that the winner was not to get the

entire £45, but that the second winner was to have his stake of £3, and that a certain sum was to be deducted for the expenses of the race; and it is argued that this was illegal under the Act of Parliament (8 & 9 Vic., c. 109, s. 18), because the winner of the race was not to get every sixpence of the sum subscribed. The Act of Parliament renders all contracts by way of wager null and void, and the sums won irrecoverable in a Court of Law; but, there is a proviso that this enactment shall not be deemed to apply to any subscription or contribution for or towards any plate, prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise; and it is said that this section only applies to horse-races where the entire sum of money subscribed is awarded to the first horse. We cannot acquiesce in that proposition. I do not see anything in the clause requiring that the entire sum subscribed should be awarded to the first horse, or to prevent us considering both first and second horses winners, each entitled to a portion of the sum subscribed; or should there be any objection to this, the sum awarded to the first horse does not cease to be a sum subscribed, because a further sum is subscribed for the second horse. Nor do I see any difficulty in considering the sum subscribed as £45 *minus* the £3, and the sum deducted for expenses. This decision of ours will not apply to a case in which the subscription is merely colourable, and the transaction in substance a wager between the owners of two horses, as in the case recently in the Court of Error. On the whole, therefore, we are of opinion that this case comes within the proviso I have read, and that the plaintiff is entitled to judgment.

M. T. 1859.

Common Pleas.

CROFTON

v.

COLGAN.

E. T. 1859.
Common Pleas.

HARDING v. CARRY.

May 10.

Where the witnesses to the original deed were "T. F., "S. M., "E. H." (no additions being annexed to any of these names), and in the memorial appeared the words, "which said deed and this memorial are witnessed by —," followed by a blank, and the grantor's name and seal; and subsequently these words, "signed, sealed and executed in the presence of T. F., S. M." (without any additions), followed by an affidavit by S. M., verifying the signature of the deed by the grantor and several grantees, and stating that deponent had seen the memorial executed by the grantor, and that he (deponent) was one of the subscribing witnesses to the deed and the memorial:—*Held*, that the registry was invalid, on the ground of the memorial not containing the names of said T. F. & S. M.

The tenant for life under the foregoing settlement granted a lease for a certain term, provided that his title should so long subsist:—*Held*, that the lease, when registered, displaced the unregistered settlement, and that the lessee became entitled to hold for the term unaffected by the fact of the lessor having been, at the date of its execution, only tenant for life.

THIS was an action of ejectment upon the title, tried before the CHIEF JUSTICE of the Court of Common Pleas, at the last Assizes for the King's County, for the recovery of the lands of Ballinacorney. The plaintiff's title was stated in the summons and plaint to have accrued on the 2nd of November 1858. In support of his title the plaintiff gave in evidence a lease, dated the 22nd of December 1777 from Charles Willington to Robert Harding, for three lives renewable for ever, of the lands in question, subject to a yearly rent of £180. He also gave in evidence a deed of settlement, bearing date the 22nd of July 1797, executed on the marriage of William Grace Harding (the plaintiff's father), whereby the lands in question were conveyed to trustees, out of which a life estate was granted to W. G. Harding, with remainder to his children, as he should by will or deed appoint, or, in default of appointment, to their as tenants in common. This deed was executed by all the parties and had indorsed upon it the usual certificate of registry upon the 8th of May 1798. There was also given in evidence a lease of the 8th of February 1826, made by the plaintiff's father to the defendant's father, to hold, from the 1st of November last past, for the natural life of Michael Carry, jun. (the defendant in the present suit), or for the term of thirty years and-a-half, whichever should last the longest, provided the title of the said William Grace Harding should so long subsist, subject to the yearly rent of £106. 18s. 5½d. A deed poll, of the 14th of September 1835, was then given in evidence whereby he appointed the lands in question to the plaintiff, and his heirs and assigns, for ever. The plaintiff then proved a

notice to quit, dated the 27th of April 1858, and served upon the 30th of the same month, requiring the defendant to quit and deliver up possession on the 1st of November then next ensuing (the term of thirty years and a-half having expired). The plaintiff's father died in the year 1828, and since then the plaintiff had been in receipt of the rents and profits of the lands from the defendant, under the lease of 1826, up to the last gale day; and upon the 22nd of November he had demanded possession, which was refused.

E. T. 1859.
Common Pleas.
HARDING
v.
CARRY.

The defendant gave in evidence the lease of the 8th of February 1826, and the certificate of registry indorsed thereon, and produced from the Registry-office the original memorial upon which the deed of settlement of 1797 was registered, and also the affidavit annexed thereto. No objection was taken to the registry of the defendant's lease; but, at the close of the evidence on both sides, the defendant's Counsel objected to the registry of the deed of settlement under which the plaintiff claimed:—first; upon the ground that the memorial did not at all contain, or purport to contain, the names of the witnesses to the execution of the deed; that the names of Faulkner and Maxwell, whose names appear in the memorial, are only witnesses to the execution of the memorial, and are not given as the names of the witnesses to the deed. Secondly; that, even if the memorial should be considered as giving the names of Faulkner and Maxwell as witnesses to the deed, still that the registry was insufficient and void, inasmuch as the memorial did not give the name of Hart, who was an attesting witness to the execution of the settlement, at the time of its registry. Thirdly; that the memorial did not contain the additions to the witnesses to the deed, as required by the Registry Act.

The learned Judge stated his opinion to be, that the memorial did not give the names of Faulkner and Maxwell as attesting witnesses to the deed of settlement, and that their names appeared in the memorial merely as the names of witnesses to the execution of it; but his Lordship left this question to the jury, as also the question of fact whether Hart had witnessed and attested the execution of the trustees to the deed of settlement, prior to its registration.

E. T. 1859.

Common Pleas.

HARDING

v.

GARRY.

The jury found that Hart had witnessed and attested that prior to its registration, and also, that the memorial did not purport to give the names of Faulkner and Maxwell as witnesses to the deed of settlement, but merely as witnesses to the execution of the memorial; and his Lordship, being of opinion that the deed of settlement required registration in order to give it effect, and that it had not been duly registered, directed a verdict for the defendant, reserving leave to the plaintiff to move to set aside the verdict, if the Court above should be of opinion that his Lordship should have held either that the deed of settlement did not require registration, or that, even if it did require registration, that it had been properly registered.—[The facts are more fully stated in the judgment of BALL, J.].

A conditional order having been obtained to set aside the verdict found—

Lynch, in support of the verdict, cited *Re Monsell* (a); 6 Am. c. 2; *Re Jennings* (b).

J. D. Fitzgerald supported the conditional order, and cited *Fabrique v. Lee* (c); 17 & 18 Vic. c. 55; 17 G. 3, c. 26 (*Eng.*); *Coust v. Phillips* (d); 7 G. 4, c. 75; *Cheek v. Jefferies* (e); *Doe v. Holloway* (f); *Doe d. Naylor v. Stephens* (g); *Owen v. Knight* (h); *Wallace v. Lade* (i); *Lessee M'Donnell v. Murphy* (j); *Mill v. Hill* (l); *O'Brien v. Tyles* (m); *Rennick v. Armstrong* (n); *Buckridge v. Flight* (o).

This case having stood over for further argument, until the following Term—

(a) 5 Ir. Chan. Rep. 531.

(b) 8 Ir. Chan. Rep. 421.

(c) 7 Ir. Com. Law Rep. 550.

(d) 4 Dowl. & Ry. 344.

(e) 3 Dow. & Ry. 267; 8 C., 2 B. & C. 1.

(f) 1 Stark. 431.

(g) 1 Price, 38.

(h) 3 Bos. & Pul. 153.

(i) 4 Taunt. 761.

(k) 2 Fox & Sm. 304.

(l) 3 H. of L. Cas. 898.

(m) 1 Ir. Com. Law Rep. 647.

(n) 1 Hud. & Bro. 737.

(o) 6 B. & C. 49.

J. T. Ball, in support of the verdict, cited *Dwarris on Statutes*, E. T. 1859. p. 606; *Gardiner v. Blessington* (a); *Const v. Phillips* (b).

Common Pleas.
HARDING
v.
CARRY.

Palles, contra, cited *Underwood v. Courtown* (c); *Warburton v. Ivis* (d); *Branley v. Plummer* (e); *Pyke v. Byre* (f).

Cur. ad. vult.

BALL, J., delivered the judgment of the Court.

This was an ejectment on the title, tried before my LORD CHIEF JUSTICE at the last Spring Assizes for the King's County. The plaintiff claimed as remainderman under the marriage settlement of his father, executed in the year 1797, whereby the lands in the ejectment were limited to the father for life, remainder (subject to a power of appointment) to the plaintiff; and a power was reserved to the father to make leases for a term not exceeding thirty-one years. The plaintiff's father died in 1837, whereupon the plaintiff became entitled to the lands, under the settlement of 1797. In the year 1826, the father being then tenant for life under the settlement, made a lease of the lands to the father of the defendant, for the life of the defendant or thirty and a-half years, whichever should last longest, "provided the lessor's title to the lands should so long subsist." The term of thirty and a-half years mentioned in that lease expired in the year 1856; and the defendant insisted, on the trial of this ejectment, that he was entitled to hold the lands thenceforward during his life, under the lease of 1826, as against the plaintiff's title under the settlement of 1797. The ground upon which the defendant rested this claim was, that the lease of 1826, having been duly registered, pursuant to the requirements of the Registry Act (6 Anne, c. 2), must prevail against the prior settlement of 1797, the registry of which, he contended, was defective. Further objections appear to have been relied on at the trial, on the part of the defendant; but, as they were not pressed on the debate of the motion for a new trial, it is unnecessary to advert to them

(a) 1 Ir. Chan. Rep. 647.

(b) 3 Russ. 267.

(c) 2 Sch. & Lef. 66.

(d) 1 Hud. & Bro. 647.

(e) 3 Jur., N. S., 401.

(f) 9 B. & C. 909.

June 15.

E. T. 1859. *now.* The subject-matter for our decision, accordingly, turns upon the imputed defects in the registry of the settlement of 1826. The reason whereof the defendant contends that his duly registered deed of 1826 is to take effect as if that settlement had never been executed. The defect in the registry of the settlement relied on by the defendant is, in substance, that the names and additions of the witnesses to the settlement are not contained in the memorial prescribed by the Registry Act. By the 4th section of that Act it is enacted that every deed a memorial whereof shall be registered, according to the rules and directions therein prescribed, shall be deemed and taken as good and effectual, both in Law and Equity, according to the priority of time of registering such memorial, against every other deed or disposition of the lands comprised in such memorial. The 5th section of the same statute enacts that every deed not registered shall be deemed and judged as fraudulent and void, as against every other deed a memorial whereof shall be registered, in pursuance of that Act, as for and concerning the lands contained in such memorial registered as aforesaid. By the 6th section it is provided that every memorial shall be under the hand and seal of some or one of the grantors or grantees of the deed whereof it purports to be a memorial, and shall be attested by two witnesses, whereof one is to be one of the witnesses to the execution of such deed. Section 7 enumerates the several matters which shall be contained in the memorial contemplated by the Act, and thereby made the subject of registration; and it directs that the memorial shall contain, among other things, the names and additions of the witnesses to the deed whereof it purports to be a memorial. From the provisions of the foregoing four sections, it thus appears that the deed which is to obtain priority by virtue of its registry is a deed the memorial whereof shall be conformable (*quoad* its contents) to the requirements of the 7th section of the Act; and no deed, the memorial whereof does not contain the several matters required by that section, can obtain a valid registry under the Act. It further appears that a deed "not registered" (which terms I read as importing not registered according to the directions of that Act, inasmuch as there was no other mode of registry then in existence)

Common Pleas.

HARDING

v.

CARRY.

shall be deemed fraudulent and void as against every other deed which shall have been duly registered pursuant to such directions. Again, it appears that it is only "such" memorial as contains the names and additions of all the witnesses to the deed, and *none other*, which the Act authorises to be registered; and, if any omission takes place in this respect, it is through the default of the party himself, and affords no ground for treating this provision of the statute as not mandatory, but directory only, as there might have been, under some circumstances, if the default were that of the officer, and not of the party. Such being the provisions of the Registry Act, it appears to us that, if the memorial of the settlement of 1797 does not contain the names and additions of all the witnesses to the settlement, it is not the instrument which the statute contemplates, and which alone is capable of being registered under its provisions; and in that case, consequently, it cannot prevail against the duly registered lease of 1826. Then let us see whether the memorial of the settlement does or does not contain the names and additions of all the witnesses to the settlement. It appears, by inspection of the settlement, which was produced on the trial, that the following were the names of the witnesses thereto:—first, Thomas Faulkner; secondly, Samuel Maxwell; both of whom appear to have attested the execution thereof by the grantor, and one of whom, viz., Samuel Maxwell, appears to have attested the execution thereof by the grantees; and, thirdly, Edward Hart, who, in addition to Samuel Maxwell, appears to have attested the execution thereof by one of the grantees. It further appears that no addition was annexed to the name of any of these witnesses in their attestation of the settlement. Then, as to the memorial, it terminates with these words, "which said deed, and this memorial, are witnessed by—." A blank is then left; and underneath, at the right-hand side of the parchment, near the margin, the name of the grantor appears subscribed, with a seal annexed; and, at the left-hand side of the parchment, near the margin, there appear written these words, "signed, sealed and executed in the presence of Thomas Faulkner—Samuel Maxwell," without any addition to the names. Then follows an affidavit by Samuel Maxwell, whereby he deposes

E. T. 1859.
Common Pleas.

HARDING
v.
CARRY.

E. T. 1859. that he has seen the settlement duly executed by the grantor in
Common Pleas. the several grantees, and that he has seen the memorial duly executed by the grantor, and that he (the deponent) is one of the subscribing witnesses to the settlement and the memorial. The question appears to have been raised as to the identity of the witnesses, Thomas Faulkner and Samuel Maxwell, who appear to have attested the execution of the memorial by the grantor, with two persons of the same name who appear to be witnesses to the settlement; and as to one of them, Samuel Maxwell, the fact of his identity appears upon his affidavit above referred to. The names of those two witnesses to the settlement are not contained in the memorial, unless their signatures to its attestation can be held to have that effect; and the name of the third witness, Edward Hart, is not in any sense contained therein.

Such being the state of facts, it is contended, on the part of the defendants, first, that as to the witnesses Faulkner and Maxwell, inasmuch as their names did not appear and were not described in the memorial as the names of witnesses to the settlement, but were only subscribed as witnesses to the memorial, the enactment of the 7th section of the Registry Act, that the memorial shall contain the names of the witnesses to the settlement, had not been satisfied, and consequently, that the registry was void. Secondly; that, even if it could be held that there had been a sufficient compliance with the 7th section (*quoad* the names of those two witnesses), the omission of their additions was fatal to the registry, under the same section. Thirdly; that the total omission of the name of the third witness, Edward Hart, from the memorial, did of itself invalidate the registry; the 7th section requiring the names of *all* the witnesses to the settlement to be contained in the memorial.

Upon the first of the foregoing objections the Court is of opinion that the requirements of the 7th section, that the memorial shall contain the names of the witnesses to the settlement, was not satisfied by what was done in this instance, and, consequently, that the registry is void. We are bound, in construing the Registry Act, to carry out, as far as may be, the object and policy of the Legislature, as set forth in its preamble; that object being to secure purchasers, and prevent forgeries and fraudulent gifts in

conveyances of lands, by settling and establishing a certain method, with proper rules and directions, for registering memorials of all deeds and conveyances affecting lands. Such is the professed intention of the Act; and with that view it proceeds to establish rules and regulations stringent in their character, and calculated to secure purchasers, and to prevent forgeries and fraudulent conveyances, through the instrumentality of the registry of memorials of deeds. Among the means adopted by the Act for this purpose is the requirement of the 7th section, of the names and additions of all the witnesses to the deed to be set forth in the memorial. The importance of this provision, as affording the means of detecting and defeating forgery and fraud, is obvious. The memorial, lodged in the Registry-office, and accessible to all the public, enables any person interested to discover at once, on the face of the instrument, the names, not of one or more, but of *all* the witnesses to the deed; and not their names only, but their additions also; thereby furnishing sources of information calculated to counteract or defeat the forgery or fraud attempted or perpetrated. Are we at liberty then to dispense with the safeguards for the integrity of our dealings, which the Legislature has supplied by this enactment of the 7th section, and this without any judicial necessity for so doing, and in contravention of the declared policy of the statute?

But, to come closer to the matter in hand, the names of these two witnesses are found only in the attestation to the memorial, and purport only to be witnesses to that instrument, and not witnesses to the settlement. Then how can any person, from reading the memorial, know that the persons so attesting it were *de facto* witnesses to the settlement? And, if he cannot do so, how can it be held that the enactment, which requires the names of the witnesses to the settlement to be contained in the memorial (obviously for the purpose of publicity and information) has been complied with? But again, it has been assumed, in the argument for the plaintiff, that the names of these two witnesses to the settlement, although not described as such, are, at all events, *contained* in the memorial. But is this the case? Does the appearance of the names in the attestation to the memorial satisfy the terms of the enactment, that they must be contained in the memorial itself?

E. T. 1859.
Common Pleas.
HARDING
 v.
CARRY.

E. T. 1859.
Common Pleas.

HARDING
v.
CARRY.

The attestation is no part of the memorial; it is *dehors* the instrument. The memorial is complete when there are contained within it all the requisites prescribed by the Act; and it is the signed and sealed by the party as a complete instrument; whatever is written after such signing and sealing is not contained in the memorial, but is outside it. The enactment is not that the names of the witnesses to the deed shall appear or be expressed in some part of the parchment whereon the memorial is engrossed, but that the memorial itself shall contain them. They must be looked for in the body of the memorial, authenticated by the signature and seal of the consenting party, and not in some other part of the parchment, unaccompanied with any authentication of the fact of their having been witnesses to the deed. Upon this part of the case, I should notice that the jury have found, as a matter of fact, that the memorial did not purport to contain the names of Faulkner and Maxwell as witnesses to the settlement.

For the reasons above expressed, we are all of opinion that, upon this first objection to the registry of the memorial, the defendant is entitled to judgment.

Upon the two further objections relied on by the defendant, viz. the omission of the additions of the two witnesses, and the omission of the name of the third witness, Edward Hart, altogether from the memorial, I certainly have formed an opinion, and I believe my LORD CHIEF JUSTICE and my other Brethren have done so likewise; but I abstain from expressing it at present, as I am satisfied to rest the decision of the case upon the single ground of the memorial not containing the names of Faulkner and Maxwell as the two witnesses to the settlement; and I do not wish, without absolute necessity, to raise questions as to the validity of the registry of deeds which may have been acquiesced in, and acted upon for many generations, as the foundation for family arrangements, which it may be the occasion of much social evil to disturb. But, it has been insisted on the part of the plaintiff that, even supposing the registry of the settlement of 1792 to be invalid, it does not follow that the lease of 1826 is subsisting, or that the plaintiff is not entitled to recover in this ejectment. This position the plaintiff seeks to maintain, upon the simple ground that the settlement

did not require registry at all, inasmuch (as I understood the argument) as the proviso in the lease, that the term thereby granted should endure only as long as the lessor's interest should continue to subsist, must be understood as referring to the life estate of the lessor under the settlement of 1797, and as so incorporating the settlement (to that extent) with the lease; or in other words, as I understood it, that there was no conflict between the settlement and the lease; and, therefore, that the non-registry of the former could have no effect in occasioning the extension of the time granted by the lease, beyond the the period when it would have terminated, had the settlement been registered. But the Court cannot acquiesce in that view of the law. If there had been no such proviso in the lease as above mentioned, the term thereby granted would have been, in point of law, the same as with the proviso inserted in the lease, viz., for one life and thirty and a-half years, dependent on the duration of the lessor's interest in the lands; such would have been, in point of law, the term vested in the lessee, in either case, upon the execution of the lease by the lessor. But upon the the registry of the lease (whenever it took place after its execution), the unregistered settlement was instantly displaced, and put out of the way of the lease, as if it never had any existence; and the lessee became entitled to hold for the term mentioned in the lease, unaffected by the circumstance of the lessor having been tenant for life only, under the unregistered settlement, at the time when he executed the lease.

Many authorities have been cited in the argument, whereof the greater number appear to be more or less remotely connected with the matter in hand. But there were two cases relied on by the defendant's Counsel, which require to be noticed as authorities for the decision at which we have arrived; I mean *In re Monsell* (a), and *In re Jennings* (b), both before the Privy Council in Ireland.

The latter is a direct authority upon the point; and the former is by necessary inference an authority also; and without overruling both, we could not come to any other decision than that which I have expressed.

Cause shown allowed.

(a) 5 Ir. Chan. Rep. 531.

(b) 8 Ir. Chan. Rep. 421.

E. T. 1859.
Common Pleas.
HARDING
v.
CARRY.

M. T. 1859.

Eschequer.

BOYLE v. MULHOLLAND.

Nov. 19.
H. T. 1860.

Jan. 14.

(Eschequer).

A deed of conveyance from the Incumbered Estates Court granted "All that part of B., together with the *kelp-shore*, containing 443 acres, and described in the annexed map; together with the sea-weed cast on the *said* *kelp-shore*, subject to the tenancies in the schedule annexed."

The map annexed to this deed drew the boundary line along the high-water mark upon the shore; and the description of the *kelp-shore* in the schedule tallied in measurement with the deed, supposing the boundary line to be the high-water mark.—*Held*, that parol evidence was not admissible to show that the words "kelp-shore"

would include the portion between high and low-water mark, the terms of the deed describing the subject-matter of the grant with sufficient certainty.

Held also, that the shore between high and low-water mark did not pass by the deed. That the "kelp-shore" was, by reference to the map and schedule, rendered a certain and specific description, and that the maxim of *falsa designatio* did not apply.

ACTION for the wrongful conversion of sea-weed; and the defence traversed the property of the plaintiff therein. The case was tried before FITZGERALD, B., and a special jury, at the Nisi Prius Sittings after last Trinity Term; and the following were the facts upon which the dispute arose:—The townland of Ballagan, lying along the shore of Carrickfergus Lough, had, with another townland called Ballavarty, belonged to the late Marquis of Anglesea and were on his death, in 1857, sold in the Incumbered Estates Court, when the defendant bought a portion of the townland of Ballagan. From the shore of this townland were obtained large quantities of sea-weed; some of which grew upon the rocks, and some was cast by the action of the tide upon the shore between high and low-water mark. This latter description was usually known as "in-blown sea-weed;" and the right to take this was the subject of the present controversy.

It appeared, on the part of the plaintiff, that the tenants of Ballavarty and other townlands had been in the habit of getting portions of this "in-blown sea-weed," by the permission of the Marquis during his lifetime. That he (plaintiff) had been a tenant of portion of Ballavarty to the Marquis during his life, and since his death to the purchaser thereof; and had been, as such, in the habit of taking this sea-weed from the shore of Ballagan for the last forty or fifty years, until he had been stopped by the defendant.

The defendant then produced in evidence his deed of conveyance from the Incumbered Estates Commissioners, dated the 17th of February 1858, under the terms of which he contended that the right to take the "in-blown sea-weed" from this shore passed to him.

M. T. 1859.
Exchequer.
 BOYLE
 v.
 MULHOLLAND.

The parts of this deed material to be considered were as follow:—"We the Commissioners, &c., do grant, &c., *all that part of the lands of Ballagan, together with Kelp-shore*, situate in the parish of Carlingford, barony of Dundalk, and county of Louth, containing *together* 443a. 1r. 5p., statute measure, or thereabouts, *and described in the annexed map*; together with *all sea-weed cast or deposited* by the sea, on the *said Kelp-shore*, and all rights, &c.; to hold the same, &c., subject to the leases and tenancies referred to in the schedule hereunto annexed." In the schedule referred to by this deed, the several denominations of the land purchased by the defendant, with their quantities, and the names of their respective occupiers, were set out. One of these was described therein as "*Kelp-shore*." Its quantity was described as 9a. 2r. 11p., which, with the quantities of the several other denominations, made up the whole number of acres mentioned in the body of the deed. Under the occupation description, this land was stated to be "*in hands*."

In the map annexed to the conveyance, the lands purchased by the defendant, including the portion described as Kelp-shore, were bounded by a red line, which was drawn along the sea-shore at high-water mark, thus excluding from the space within it the shore between high and low-water mark, from which the right to take the sea-weed was claimed by the disputants. It appeared further, that this space had belonged to the Anglesea estates, and not to the Crown.

Counsel for the defendant contended that this deed passed to the defendant not only the townland delineated in the map, but also the sea-shore in front of his land, and all the right to the sea-weed which had belonged to Lord Anglesea; and called upon the Judge to leave the question to the jury, whether the shore between high and low-water mark passed by the deed

M. T. 1859.
Exchequer.
 BOYLE
 v.
 MULHOLLAND.

to the defendant? or to construe the deed, and tell the jury to the shore passed by it to the defendant; both of which the learned Judge refused to do.

Defendant's Counsel then tendered evidence to show that the Kelp-shore mentioned in the deed meant, and was known as, the shore of Ballagan between high and low-water mark; stating that his object was to have a question left to the jury, whether the *locus in quo* was commonly known by the name of "Kelp-shore?" and that if they should find that it was, then to require a direction for the defendant. But the learned Judge rejected such evidence, and declared that, even if such evidence were given, it would not give such a direction. The fact of the taking of the sea-weed from the plaintiff having been then left to the jury, they found for the plaintiff, with sixpence damages. Leave was reserved by the learned Judge, for the defendant to move for a new trial; or if, upon the true construction of the defendant's conveyance, the Court should be of opinion that the right to the sea-weed or property in the shore between high and low-water mark passed to the defendant, that the verdict had for the plaintiff should be changed into a verdict for the defendant.

A conditional order having been moved for and obtained by the defendant, in accordance with this reservation—

Serjeant *O'Hagan* (with whom were *S. Ferguson* and *O'Driscoll*) now appeared to show cause.

Parol evidence is not admissible where the deed is unambiguous and, at all events, not to contradict the deed. This deed is clear in the statement of the quantity of the lands granted and their boundaries, and the map is consistent with that: *Dublin and Kingstown Railway v. Bradford* (a); *Roe v. Lidwell* (b); *Broom's Legal Maxims*, p. 562, where all the cases under the maxim of *falsa designatio* are collected. *Llewellyn v. Earl of Jersey* (c) shows how the subject-matter of a deed is made certain and specific by a schedule and a map: *Barton v. Dawes* (d). A grant of a thing

(a) 7 Ir. Com. Law Rep. 57, 624.

(b) 9 Ib. 184.

(c) 11 M. & W. 189.

(d) 10 C. B. 281.

certain may be diminished, though not wholly made void: *Stukeley v. M. T. 1859.*
Butler (a); *Brooke's Abr.*, tit. *Grant*, par. 92; *Doddington's case (b)*.

Eschequer.
 BOYLE
 v.
 MULHOL-
 LAND.

Serjeant *Fitzgibbon*, *Richard Armstrong* and *Hamill*, for the defendants. The deed included this portion of the shore. The rule of construction furnished by *Dowie's case (c)*, and adopted ever since, is, that if there be a sufficient and certain description of the subject-matter of the grant, no subsequent addition or description shall be suffered to interfere with it, or the foregone certainty of description. That was the case in *Dublin and Kingstown Railway v. Bradford (d)*; *Roe v. Lidwell (e)*. The grant of the Kelp-shore by name, in the first instance, conveyed the whole. The schedule to the deed is only to be looked at for the purpose declared by the deed, that is, to ascertain the tenancies. The map is merely a description of boundaries, and if the estate were first accurately described, a following inaccurate description of boundaries would not cause any injury. There are three degrees of certainty stated in *Bacon's Max.*, p. 102. The first or highest, is *presentia corporis*; the next, name; and the lowest, demonstration or reference. The defendant relies on the second of these, which is name, and the plaintiff on the map, which answers to the third, and is not so high a degree of certainty. If the deed contain two descriptions of equal certainty, the first must prevail. The deed must be construed most strongly against the grantor, and there is no right of way reserved over the portion admittedly granted, as would be necessary to have access to this disputed part, if it did not pass. The grant of the sea-weed cast on the shore was an absurdity.

S. Ferguson, in reply.

The latter part of the description limits the generality of the former: *Andrew Ognel's case (f)*; *Ashforth v. Bower (g)*; *Bac.*

(a) Hob. 171.

(b) 2 Rep. 33 a (n.) A.

(c) 3 Rep. 10 a.

(d) 7 Ir. Com. Law Rep. 57, 624.

(e) 9 Ir. Com. Law Rep. 184. (f) 4 Rep. 50 a.

(g) 3 B. & Ad. 453.

M. T. 1859. *Ab., Grant H, 1; Morell v. Fisher (a); Wood v. Rowcliffe (b)*
Eschequer.
 BOYLE
 v.
 MULHOLLAND.
 There is no latent ambiguity here: *Lambe v. Reaston (c)*.—[P. got, C. B. That would be a distinct authority for showing the all within the red line passed; but hardly to show that nothing else passed. If it appeared that no sea-weed was cast upon the Kelp-shore within the red line, would that furnish the argument that the said Kelp-shore referred to the Kelp-shore mentioned before that, and upon which the sea-weed was cast?]*—Utile per inutile non vitiatur*; and such a construction would contradict the map: *Attorney-General v. Chambers (d)*. The portion granted by this deed is described as being situated within the parish of Carlingford; and the shore below high-water mark is extra-parochial: *Roe v. Musson (e)*. The particular thing granted is sufficiently ascertained: *Roe v. Vernon (f)*; *Goodtitle v. Southern (g)*; *Lord Waterpark v. Fennell (h)*.

Cur. ad. vult.

The judgment of the Court below was now delivered by—

GREENE, B.

H. T. 1860.
 Jan. 14.

The question in this case is, whether the soil between high and low-water mark passed to the defendant, under the deed of the 17th of February 1858, executed by the Commissioners of the Incumbered Estates Court, under the name of the "Kelp-shore?" The deed purports to convey "all that part of the lands of Ballagun together with the Kelp-shore, situate in the parish of Carlingford barony of Lower Dundalk and county of Louth, containing, together, 443a. 1r. 5p., statute measure, or thereabouts, and described in the annexed map, together with all sea-weed cast or deposited by the sea on the said Kelp-shore." The map referred to is bounded by a red line of circumference, which runs between high and low-water mark, and, consequently, excludes the *locus in question*, which is designated on the map as "strand uncovered at low-water."

(a) 4 Ex. Rep. 591.

(c) 5 Taunt. 207.

(e) 4 Eng. Jur., N. S., 111.

(g) 1 Man. & Sel. 299.

(b) 6 Ex. Rep. 407.

(d) 4 De G., M. & G. 306.

(f) 5 East, 51.

(h) 5 Ir. Com. Law Rep. 121.

The map also comprises twenty-seven divisions or lots, each separately numbered, and corresponding with a schedule of tenancies annexed to the deed, and similarly numbered. No. 27 in the map is in the schedule designated "Kelp-shore," and stated to be "in hand," that is, not in the tenure of any tenant. The conveyance specifies 448 acres, more or less; and the acreable contents of each of the divisions on the map are stated in the schedule, opposite to or in connection with the corresponding number. No. 27, or "Kelp-shore," is stated to contain 9a. 2r. 11p. Outside the boundary-line to which I have referred are the words, "strand uncovered at low-water." Upon computation, it appears that the number of acres made up by the addition of the contents of the several divisions on the map, excluding the part between high and low-water mark, corresponds with the whole number of acres specified in the body of the deed.

At the conclusion of the argument, last Term, I was clearly of opinion, and was then prepared to express it, that, upon these facts, the soil in question did not pass to the defendant by this deed. It is not now the question whether the Marquis of Anglesea, whose estate the Commissioners professed to sell, was in possession, or acted as owner, of this piece of ground; nor yet, what may have been the intention of the Commissioners to include it in their conveyance. Their deed, like any other deed, must speak for itself, and cannot be interpreted by extrinsic evidence, save so far as the deed of any individual may, by the general rules of law, be so interpreted. There are undoubtedly cases in which parol evidence is admissible, as well with respect to deeds as to wills and other written instruments, for the purpose of identifying or ascertaining the subject-matter of the grant or devise, where the description of it in the instrument itself is so vague and indefinite as to be incapable of ascertainment, without the aid of extrinsic evidence. But where that is not the case, and the writing is on the face of it capable of an intelligible construction, that construction it must receive. The distinction is taken in the recent case of *Evans v. Angell* (a), in which a testator had devised all his freehold, copyhold and lease-

H. T. 1860.
Eschequer.
 BOYLE
 v.
 MULHOL-
 LAND.

H. T. 1860.

Eschequer.

BOYLE

v.

MULHOL-

LAND.

hold messuages, lands, &c., situate in the parish of Crowhurst, in the county of Surrey, with their appurtenances. He had an estate in fee-simple in the parishes of Crowhurst, Limpsfield and Lingfield. It was held that pieces of land situate within the two latter parishes, although always let with those in the parish of Crowhurst, and occupied by the same tenant, did not pass by the terms of the devise. The Master of the Rolls held that it would have been otherwise, had the testator used such general words as "my Crowhurst estate;" as, in that case, evidence would have been admissible to show the quantity and extent of that estate; and his Honor cited the rule as laid down by the Lord Chancellor, in *Richetts v. Turquand*, &c. in this manner:—"If a testator describes lands in a particular parish, by a particular name, or in a particular locality, you cannot go into evidence to show he meant, by the general appellation, to include something out of it; you cannot do that, without contradicting the express terms used." Other authorities to the same effect might be cited. Now we have here a description in the deed, free from ambiguity, consistent all through, and not, as in cases of a *falsa designatio*, compelling the Court to reject a portion, as irreconcilable with another portion clearly defined. It does not appear to me that the present case requires the application of the rule, *falsa designatio non nocet*. The thing granted is not the Kelp-shore generally, but the Kelp-shore as delineated on the map; and when we come to look at the map we do not find, as in *Llewellyn v. Lord Jersey* (b), and that class of cases, any one part of the map at variance with any other part, or with the body of the deed, but all is harmonious. The map has a division numbered 27, which is bounded by high-water mark. The schedule annexed to the deed states No. 27 to be the Kelp-shore, and to contain a specific quantity of land. That acreage, added to the contents of the other numbers on the map, as appearing by the schedule, makes up the whole number of acres which the Commissioners profess to grant in the body of the deed. The grant of the sea-weed cast on the said Kelp-shore leaves the Kelp-shore granted just what it was before. Under these circumstances, I see no ground for saying that any doubt is suggested by either the deed itself, or by the map or

(a) 1 H. L. Cas. 490.

(b) 11 M. & W. 169.

schedule. The thing called "Kelp-shore" is completely, fully and, I think, unmistakably, pointed out; and to admit parol evidence, for the purpose of bringing within the operation of the grant the soil below high-water mark, would be, as Lord Cottenham says, in the case of *Ricketts v. Turquand*, to contradict, by parol evidence, the express terms of the deed. I am, therefore, of opinion that the plaintiff is entitled to our judgment.

H. T. 1860.

Eschequer.

BOYLE

v.

MULHOL-

LAND.

FITZGERALD, B.

I concur in the judgment delivered, but wish to say a few words with reference to certain legal rules, and to two authorities mainly relied on for the defendant in the argument. He relied on the maxim, "*falsa demonstratio non nocet*." The meaning of that rule, as applied to cases like the present, I take to be this: If a grant indicates the thing conveyed by an enumeration of several particulars, and there be in existence no subject-matter, the property of the grantor, in which all those particulars concur, but there be a subject in which some of them do, that subject shall pass, and the inapplicable particulars shall be rejected as mistaken description; otherwise nothing would pass by the grant. The rule is subject to another, which shows its real meaning, "*non accipi debent verba in falsam demonstrationem quae continent in limitationem veram*;" the meaning of which is—if there be a subject-matter in which all the particulars mentioned in the grant concur, and another subject, in which some only of them concur, the particulars wanting in the latter, but found in the former, shall not be considered mistaken description to pass the latter, but that subject shall pass in which all the particulars concur. Apply these rules to the case before us. There is a subject-matter in which all the particulars mentioned in the grant concur; it is Kelp-shore, it is comprehended within the limits marked on the map and so forth. I assume the evidence rejected would have shown that it is part of a larger tract, which would properly be described as Kelp-shore, but whose limits are different from, and more extensive than, those described in the map. The term "Kelp-shore" is applicable to the whole, but the additional particulars in the grant limit it to an ascertained part. To reject then, as mistaken description, the

H. T. 1860.

Eschequer.BOYLE
v.

MULHOLLAND.

description in the map, would be to violate the second rule; just as if a man having the lands of Blackacre, partly situated in Dublin and partly in Meath, should grant the lands of Blackacre in Dublin and it were held that the part in Meath passed as well as the part in Dublin, and not the part in Dublin only. If, in the case supposed, he granted the lands of Blackacre in Dublin, Meath and Kildare, there being no part of Blackacre in Kildare, "in Kildare" might, under the first rule, be rejected as mistaken description because there would then be no subject-matter fulfilling all the conditions in the grant. The cases relied on were *The Dublin and Kingstown Railway v. Bradford* (a), and the case of *Roe v. Liwell* (b). In the former case the subject of the grant to be construed was the premises demised by a lease, excepting a certain part, to which a description was given in the grant; and the premises granted were further described by reference to a map annexed. The map when referred to included portions of that which, according to the description, was included in the exception. Here, plainly, there was no subject-matter in which all the particulars mentioned in the grant concurred. If you adopted the map, you must partially have rejected the description in the exception, and *vices versa*. The Court, and probably on sufficient reasons, rejected the description in the map, as mistaken description; but it is clear the ground of applying the rule of mistaken description existed, *viz.*, there being no subject-matter which fulfilled all the conditions of the grant. The latter case was of the same kind. The grant in question purported to convey the lands of Dromardmore, particularly described in a map annexed; but on reference to the map annexed, it included forty-five acres of a distinct denomination called Dromardbeg. Here there was no subject-matter which fulfilled both conditions of being Dromardmore, and being comprised within the limits described in the map. The Court, and probably on sufficient reasons, rejected the description of the map as mistaken description; but the ground of applying the rule of mistaken description entirely existed, because there was no subject-matter in which all the particulars mentioned in the grant concurred.

FIGOT, C. B., and HUGHES, B., concurred.

(a) 7 Ir. Com. Law Rep. 57, 624.

(b) 9 Ir. Com. Law Rep. 184.

H. T. 1860.

Eschequer.

M'CAFFREY v. BRENNAN.

Jan. 30.

THIS was an application that further proceedings in this cause might be stayed, until the plaintiff gave security for costs, on the ground that the action had been promoted by third parties, for their own benefit, and that plaintiff had been put forward to carry on same for their benefit.

The action, which was one of ejectment for non-payment of rent, was brought to recover the possession of certain premises in the county of Monaghan. The particulars indorsed on the summons and plaint were, for eight years' rent from the 1st of November 1851 to the 1st of November 1859. The affidavit of the defendant, Patrick Brennan, stated that Michael M'Caffrey was seised in his lifetime of the premises, the subject-matter of the ejectment, which were of freehold tenure, and that he died in April 1852, having by his will, dated the 20th of March 1852, directed "that his "freehold property in the town of Ballibay should be appropriated "to the building of a Catholic chapel in the town of Ballibay, in "such a way as his executors should think proper;" and he appointed two executors, of whom the Rev. Edward Goodwin was now the survivor. That, after the testator's death, the executors sold to the defendant the testator's interest in the premises, for £470; but, as he was advised the devise for charitable purposes was invalid under the circumstances, he had declined to pay the purchase-money, without a conveyance from the heir-at-law. That he had been informed by the Rev. Mr. Goodwin that there was an agreement in writing between him and the present plaintiff, whereby, in the event of the plaintiff succeeding, he was to pay the Rev. Mr. Goodwin a large sum of money. That the plaintiff had not himself contributed one farthing to carry on the present proceedings; but that same had been promoted and are carried on by Mr. Goodwin, and that he or other parties had put forward

The Court will not order a plaintiff, an heir-at-law, to give security for costs, because it is sworn that he is a pauper, and had agreed, if he should succeed, to give a large sum of money to a third person, it being denied that he had been put forward by that person to bring the action.

H. T. 1860. *Exchequer.*
M'CAFFREY
 v.
BRENNAN.

the plaintiff, for their benefit, and to carry out the intention expressed by the testator. That the plaintiff was a pauper, and altogether unable to pay costs. The affidavit of the plaintiff's attorney, filed to oppose the motion, stated that he had been retained by the plaintiff in the year 1852, to recover the possession of the premises in question; but that, as the title-deeds and leases were in the possession of the executors, he was unable to obtain the necessary information, and was obliged to make registry searches. That he had been in constant communication with the plaintiff for the last six years, and took proceedings the moment he obtained from the executors possession of the deeds. That the plaintiff had entered into an agreement with the Rev. Mr. Goodwin to subscribe towards the building of a Roman Catholic church, at present in course of erection, in case he succeeded in recovering the property. That the plaintiff was his only client in this matter; and that the action was not brought for the benefit of any other person, or for any purpose other than the *bona fide* purpose of enforcing payment of the rent to the plaintiff, and that he was not a pauper.

Serjeant *O'Hagan* (with him *A. Vance*), in support of the application.

The nominal plaintiff has clearly been put forward by the Rev. Mr. Goodwin, for purposes of his own; it is substantially Mr. Goodwin's action.—[Pigot, C. B. That is expressly denied.]—It is admitted that there is an agreement, under which Mr. Goodwin is to get a large sum of money, if the plaintiff succeeds. It is also sworn, and the allegation is not satisfactorily denied, that the plaintiff is a complete pauper.—[Pigot, C. B. Is there any authority for an order to compel a plaintiff within the jurisdiction to give security for costs, merely upon the ground of poverty? It has happened that, where a party to a bill of exchange, wishing to escape the peril of costs, has indorsed the bill to a pauper, the indorsee has been compelled to give security for costs; but is there any case in which a person who really wishes to try his title has been ordered to give security for costs, where the case is not one of oppression?—The plaintiff is confessedly a pauper; and, although

he may have the legal estate, and be the only person who could maintain the action, if the Court is satisfied that this is substantially Mr. Goodwin's action, and is carried on at his expense, it will order security to be given. In *Sheehy v. Dorman* (a), security was ordered to be given, though it appeared that the plaintiff had an individual interest in the action; because it was carried on at the expense of other persons, and because the plaintiff, a pauper, had been put forward by those persons.

H. T. 1860.
Eschequer.
M'CAFFREY
v.
BRENNAN.

H. Law, contra.

This application is founded solely upon the allegation of pauperism; but it is sworn that the plaintiff is a farmer. The attorney swears that he has been in communication with the plaintiff since 1852, and never with any other person, and that the action is carried on for the benefit of the plaintiff. We admit that an arrangement has been entered into with Mr. Goodwin, to give him a subscription towards the building of the chapel; but Mr. Goodwin is not to get the property.—[GREENE, B. Suppose it to be true that such an arrangement was entered into, has not the plaintiff a right to assert his title as heir-at-law?—The test is, whether the plaintiff would not have brought the action but for the instigation of Goodwin: *Hearsey v. Pechell* (b). Here, it appears that the plaintiff gave instructions to bring the action in 1852.

A. Vance, in reply.

The action is substantially for the benefit of Mr. Goodwin, and was brought at his instigation. The clause in the will appropriating this property to charitable purposes is invalid, and the object of this action is indirectly to affirm that clause. It is admitted that Goodwin is to get "a large sum of money." That may be the entire value of the property. The attorney says the title-deeds were only recently handed over to him; they were in the possession of Goodwin, and were handed over for the purpose of

(a) 2 Fox & Sm. 238.

(b) 5 Bing. N. C. 466; S. C., 7 Dowl. P. C. 437.

H. T. 1860. this action. He cited *Egan v. Kirhaldy* (a); *Larkin v. Larkin*;
Erchequer. *Ball v. Ross* (c).
M'CAFFREY
 v.
BRENNAN. **PIGOT, C. B.**

This is really a most untenable application. If the case made the defendant had been that Mr. Goodwin, having sold the property and repenting of his bargain, made an arrangement with the heir-at-law, by which, without paying anything, he was to get possession of the property,—if he had instigated the plaintiff to bring this action and had wielded the dominion of the heir-at-law, for the purpose of recovering this property, and thereby effecting a fraud, the case might be within the authorities, and we might, and I think ought to have enforced this jurisdiction to defeat that fraud. But the case of the defendant is that, having bought from an executor, who has no title, he has detained the property for six years from everyone. The executor cannot recover the property, or at least has not attempted to do so. The defendant has not given back the property but he has taken back his money, and, holding the money and the property, he now seeks to prevent the only person in the jurisdiction who has a title from proceeding to recover the property except on the terms of giving security for costs. If the plaintiff has a fair claim, as heir-at-law, he is entitled to litigate it; and though he may choose to affirm the will, to a certain extent, and say to the executor, “give me the means of prosecuting this proceeding, and I will give you a donation, but I will not give you the estate,” he still plainly has an interest in the action, for he will get the estate for himself. This, therefore, is not a case in which the plaintiff has been put forward for the purpose of oppression, or for the purpose of procuring a benefit for a third party. The result of staying the proceedings would be that the defendant would himself keep the property, without title, and would prevent the person from whom he purchased the estate getting it himself.

Motion refused, with costs.

(a) 3 Ir. Law Rep. 542.

(b) 7 Ir. Law Rep. 227.

(c) 1 Scott, N. S., 217.

H. T. 1860.

Eschequer.

WATSON

v.

ATLANTIC ROYAL MAIL STEAM NAVIGATION CO.

Jan. 12.

THIS was a motion, on the part of the plaintiff, to make absolute a conditional order of the 25th of November last, substituting service of the writ of summons and plaint in this cause on Mr. Robert Jackson, one of the secretaries in Dublin of the defendants. The summons and plaint contained five counts; and the first count complained in substance that the defendants were the owners of a vessel called the "Argo," sailing from New York to Galway, and that they received the plaintiff on board as a passenger from New York to Galway, and also his luggage, to be securely carried by the defendants, and delivered to him at the end of the voyage. Breach.—That the defendants did not securely carry the plaintiff and his luggage from New York to Galway, but that, through the negligence of the defendants, and the officers and sailors, the ship was wrecked, and the plaintiff's luggage wholly lost. By the second count, which was the same in form, the defendants were sought to be charged as common carriers between New York and Galway. The third count stated a contract to carry the plaintiff and his luggage, and land them at Galway. Breach.—That the defendants did not land plaintiff, with his said luggage, at Galway, but that, through the negligence of the defendants, the vessel was wrecked, and the plaintiff's luggage lost. In the fourth and fifth counts the contract and breach were similarly stated. The conditional order to substitute service was obtained on affidavits showing that Mr. Jackson was the defendants' agent in Ireland; but they did not state (and the omission was not brought under the notice of the Court) that the cause of action arose within the jurisdiction.

An affidavit was then filed, on behalf of the defendants, as cause against the conditional order, which stated that the defendants were

Where a summons and plaint stated a contract by the plaintiff at New York, with the defendants, an English Company, to convey him and his luggage to, and deliver them at, an Irish port, and then averred, as a breach, that the defendants did not so deliver them, but that, through the negligence of the defendants and their servants, &c., the vessel was wrecked at sea, and the luggage lost:—*Held*, that no part of the cause of action had arisen within the jurisdiction, so as to justify the Court in substituting service of the writ of summons and plaint upon the agent in Ireland of the defendants.

H. T. 1860. *an English Company, incorporated under the Joint-stock Companies Acts 1856, 1857, with limited liability; and that the registered office for the transaction of the business of the Company was situated in Cannon-street, London, and that the whole cause of action (any) in this suit arose outside the jurisdiction of the Court: the United States of America, or on the high seas. The plaintiff's attorney, in his affidavit in reply, stated that the cause of action did arise, as he believed and submitted, within the jurisdiction of the Court; inasmuch as the defendants contracted and agreed with the plaintiff, in consideration of the payment to them of a certain sum, to land the plaintiff and his luggage at the port of Galway in Ireland, and which contract and agreement with the plaintiff in that behalf was violated by the defendants.*

Exchequer.
WATSON
v.
ATLANTIC
R. M. S. N.
COMPANY.

F. Macdonogh (with him W. J. O'Driscoll), in support of the motion.

It is not necessary for us to show that the entire cause of action arose in Ireland. The course of practice, in the case of contracts entered into with Insurance Companies, has been to treat the cause of action as having arisen within the jurisdiction, for the purposes of an order under the 34th section of the Common Law Procedure Act 1853, if the policy has been proposed for in Ireland, and delivered in Ireland: *Betham v. Fernie (a)*; *Frederick Stone (b)*; *Kett v. Robinson (c)*. The form of the affidavit in the case is sufficient: *Miller v. O'Brien (d)*. The cause of action was consummated at Galway, by the non-delivery there of the plaintiff and his luggage. Until that delivery, the contract of the defendants could not be treated as performed; and, therefore, the non-delivery is a material part of the cause of action, within the meaning of the authorities.

S. Ferguson and R. Dowse, contra.

The cause of action here did not arise within the jurisdiction. The mere breach or the non-performance in Ireland of a contract

(a) 4 Ir. Com. Law Rep. 92.

(b) 6 Ir. Jur. 267.

(c) 4 Ir. Com. Law Rep. 186.

(d) 1 Ir. Jur., N. S., 109.

entered into in a foreign country is not such a substantial part of the cause of action as will give this Court jurisdiction. The exercise of the jurisdiction in this country cannot be more extensive than in England; but the language of the similar section in the English Act, 15 & 16 *Vic.*, c. 76, s. 18—"It shall be lawful for the Court or Judge, upon being satisfied by affidavit that there is a cause of action, which arose within the jurisdiction," &c., excludes the idea of the case suggested being within it. The 503rd and 504th sections of the Merchant Shipping Act (17 & 18 *Vic.*, c. 104, part 9) show that this is substantially an action of tort; and the introduction of a colorable assumpsit will not change its form. In *Williams v. Land (a)*, a contract was made in Devon to convey the plaintiff to Falmouth. The coach was upset in Cornwall, through the alleged negligence of the defendant; and it was held that the cause of action arose entirely, so as to retain the venue, in the county where the injury was sustained. It is settled that, upon a question whether an Inferior Court has jurisdiction over a cause, it must be shown that the whole cause of action arose within its jurisdiction: *Harwood v. Lester (b)*. We admit that is not necessary in a case like the present; but they must show that a material part of the cause of action occurred in Galway. But it was complete upon the high seas, when the alleged negligence took place. The negligence is the gist of the action; so that we have the contract made in New York, and the cause of action consummated upon the high seas. *Collins v. De Montmorency (c)* shows that the Court is bound by the language of the section. In *Kisbey v. Chester and Holyhead Railway Company (d)*, the ground of the order was, that though the contract was entered into and the breach occurred in England, the plaintiff's luggage was detained by the defendants in Dublin; and the plaint contained a count for that detention; so that there was a substantial cause of action in this country.

W. J. O'Driscoll, in reply.

Under the Passengers Act 1855 (18 & 19 *Vic.*, c. 119), the Com-

(a) 4 Taunt. 729.

(b) 3 Bos. & P. 617.

(c) 3 Ir. Com. Law Rep. 473.

(d) 2 Ir. Jur., N. S., 330.

H. T. 1860.
Eschequer.
WATSON
v.
ATLANTIC
R. M. S. N.
COMPANY.

H. T. 1860. *Eschequer.*
WATSON
 v.
ATLANTIC
R. M. & N.
COMPANY.

pany were bound to give a contract note to the plaintiff. The plainly was the contract which the summons and plaint sue namely, a contract to convey the plaintiff and his luggage to Galway, and deliver them there. A breach of that contract expressly averred; and the mere use of the word "negligently" does not convert the count into a count in tort. The non-delivery therefore, in Galway is a material fact of those which constitute the entire cause of action. The Court will struggle to uphold its own jurisdiction.

GREENE, B.

This is an action by a plaintiff, resident in Ireland, against an English Company; and the question is, whether I ought to make absolute a conditional order for substituting service in Ireland of the summons and plaint upon certain persons named in that order?

This is a statutable power, conferred by the 34th section of the Common Law Procedure Act 1853; and, in order to justify the Court in exercising it, it must appear that the cause of action arose within its jurisdiction. It is not necessary that every fact constituting the cause of action should have arisen within the jurisdiction of the Irish Courts: it is sufficient, and has been so decided, that some one or more material fact or facts should have arisen within it. Where that element exists, the Court will not measure the materiality or importance of such fact or matters.

It lies, however, on the party applying to the Court for an order of this nature, to show that the cause of action did arise within the jurisdiction; that is, some necessary ingredient to sustain the action. The question is, whether that has been done in this case? and I am obliged to say, whatever my own inclination on the subject may be, that this condition has not been complied with. When the motion was first made, and the conditional order granted, it was not alleged that the cause of action arose within the jurisdiction. That was an omission to which, if the attention of the Court had been called at the time, it probably

would not have acted, at least without requiring an additional affidavit to be filed to supply the omission. I am not, however, going to decide this motion upon the defect in the original affidavit. It does not appear to me, upon the affidavits now relied upon, that any material fact or circumstance is shown to have occurred within the jurisdiction, so as to warrant the interposition of the Court. The inference is indeed the other way. Mr. Mills, who makes the affidavit, no doubt states that he is advised and believes that the cause of action did arise within the jurisdiction. What might have been the value of that, if it stood alone, I do not feel it necessary to offer any opinion; Mr. Mills does not speak from his own knowledge, but states merely his own inference, from the facts which he specifies, as the grounds upon which he arrived at that conclusion.

The question is, whether the Court can draw the same inference from these facts? and that I cannot do. The plaint is substantially founded upon a tort. It alleges, with the exception of a single count, breaches of duty on the part of the defendants, negligence and carelessness. There is no doubt that the third count contains an allegation of a contract to deliver, and a non-delivery of the goods in Galway, and that the defendants' negligence was such that delivery took place.

It appears to me, however, for the purposes of this motion, to be not of very great consequence whether the action be founded on contract or tort. In either way it appears, upon the summons and plaint and affidavits, that every fact necessary to constitute the cause of action occurred out of the jurisdiction. The summons and plaint, no doubt, alleges a non-delivery; but I do not consider that the allegation of a negative is a sufficient statement of a cause of action, having regard to the other facts which appear upon the record. The mere non-delivery in Galway is not sufficient to satisfy me that any part of the cause of action arose within the jurisdiction. If the action were brought against the defendants as common carriers, bound to deliver the goods in Galway, the case might be different. It is not for me to say what the effect of that might have been; it might be held that the non-delivery was

H. T. 1860.

Eschequer.

WATSON

v.

ATLANTIC

R. M. S. S.

COMPANY.

H. T. 1860. *Eschequer.*
 WATSON
 v.
 ATLANTIC
 R. M. S. N.
 COMPANY.

the foundation of the action; but it appears to me that this action, whether on contract or tort, is founded on facts no one of which occurred within the jurisdiction of the Court. I am, therefore, compelled to say that the plaintiff has not brought himself within the 34th section of the Act; not having stated facts to show that the cause of action arose within the jurisdiction. If it did not, I cannot assume a jurisdiction not conferred by the statute. Here the plaintiff's cause of action was complete when the vessel was wrecked at sea: there was then a consummate cause of action, and that most clearly occurred out of the jurisdiction. For these reasons, I am of opinion that the cause shown against the conditional order must be allowed.

SAWYER v. NORRIS.

Jan. 13, 14.

This Court has no power, since the passing of the 21 & 22 Vic., c. 72, the Sale and Transfer of Land (Ireland) Act, to attach the interest of a debtor in funds standing to the credit of a matter in the Landed Estates Court.

In this case cause was shown, on behalf of the defendant, why a conditional order made by HUGHES, B., in Chamber, attaching certain funds standing to the credit of a matter in the Landed Estates Court, should not be made absolute. It appeared that a petition had been presented to the Commissioners of the Incumbered Estates Court for a sale of certain lands in which the defendant was interested, and an absolute order for sale was made by the Commissioner in the matter.

After the making of that order, and before the sale, the 21 & 22 Vic., c. 72 (the Sale and Transfer of Land, Ireland, Act), came into operation, and the property was sold, by a Judge of the Landed Estates Court, and the purchase-money paid in to the credit of a matter in that Court. A conditional order to attach the interest of the defendant in those funds, under the 135th

section of the Common Law Procedure Act 1853, having been H. T. 1860.
obtained— *Eschequer.*

SAWYER
v.
NORRIS.

W. W. Brereton (with him *W. P. Carr*) showed cause.

Unless the 135th section of the Common Law Procedure Act 1853 can be construed to authorise an attachment order against funds standing to the credit of a matter in the Landed Estates Court, this order must be set aside. It could not have been made, except under that section; for it was decided in *Howlett v. Hackett* (a), by the Court of Common Pleas, that the Accountant-General, or Judges of the Incumbered Estates Court, were not trustees for the party entitled to the fund, within the meaning of the 23rd section of Pigot's Act, 3 & 4 Vic., c. 105.

That case was decided before the passing of the Common Law Procedure Act 1853. Under the 135th section of that Act, an attachment order can be obtained against the interest of a debtor, in stock or money "standing in the name of the Accountant-General of the Court of Chancery, or the Court of the Commissioners for the Sale of Incumbered Estates in Ireland." By the 21 & 22 Vic., c. 72, the Incumbered Estates Court is abolished, and a new Court, the Landed Estates Court, is constituted. As, therefore, the Court mentioned in the 135th section of the Common Law Procedure Act 1853 has altogether ceased to exist, and the 21 & 22 Vic., c. 72, contains no section which authorises a Common Law Court to make an attachment order against funds standing to the credit of a matter in the Landed Estates Court, the order was made without jurisdiction, and must be set aside.

C. Andrews and *C. Coates*, contra.

The powers and jurisdiction of the Commissioners of the Incumbered Estates Court are continued by the Landed Estates Act; one Court is substituted for the other.—[GREENE, B. We have no difficulty in acceding to the proposition that all the jurisdiction conferred by the former Acts upon the Commissioners of the Incumbered Estates Court has been conferred upon the Landed

H. T. 1860. *Exchequer.*
SAWYER
v.
NORRIS. Estates Court, but the jurisdiction given by the 135th section is a jurisdiction in this Court; and what we desire to know is, whether there is any section continuing to us the jurisdiction given by the 135th section?—The Legislature must have contemplated the continuance of the jurisdiction. In *The Attorney-General v. The Corporation of London (a)*, it was held that where the Court of Exchequer had a peculiar jurisdiction in Equity in matters relating to the Revenue, before the Act transferring the equitable jurisdiction of that Court to the Court of Chancery, the new Court, after the passing of the Act, had the same power.—[GREENE, B. This case was quite right, because the Court of Exchequer had jurisdiction before the passing of the Act. All the case decided was, that the Act transferred that with all other jurisdiction].

Cur. ad. vult.

PIGOT, C. B.

In the case of *Sawyer v. Norris*, we have looked into the Act of Parliament upon which the question depends. The object of the motion was to set aside an order attaching funds in the Landed Estates Court. This appears to me to be one of those cases in which argument will only make obscure that which is in itself perfectly clear. In *Howlett v. Hackett (b)*, it was held that the Court had no power, under the 23rd section of the 3 & 4 *Vic.*, c. 105, to attach funds standing to the credit of a party in the Incumbered Estates Court. Then the 135th section of the Common Law Procedure Act 1853 in terms provided that if any debtor “shall have an estate or interest in any stock, funds, annuities, or shares, or money, which shall be standing in the name of the Accountant-General of the Court of Chancery, or of the Court of the Commissioners for the Sale of Incumbered Estates in Ireland, or of the Master of any such Superior Court of Common Law, or in the dividends, interest or annual produce thereof, it shall be lawful for the Court or a Judge to make such order as to said stock, funds, annuities, shares, and the dividends, interest and annual produce thereof, as if the same had been standing in the name of a trustee for such judge

(a) 8 Beav. 270.

(b) 5 Ir. Jur. 110.

"ment debtor." By an express enactment of the Legislature, the Incumbered Estates Court has ceased to exist, and a new Court has been called into existence, the Landed Estates Court. The provisions of the 135th section apply to the ceased Court; and it is impossible we can apply to the new-born jurisdiction, created by the Landed Estates Act, the powers conferred by the 135th section. We must set aside the order; but as this is the first time the matter has been mentioned, we shall give no costs.

H. T. 1860.

Exchequer.

SAWYER

v.

NORRIS.

LORD DUNSANDLE v. FINNEY.

Jan. 24, 25.

THIS was a motion, on behalf of the plaintiff, for liberty to mark interlocutory judgment for the residue of the plaintiff's claim, in the first paragraph of the summons and plaint mentioned; or that the defence to the said first paragraph might be set aside, same being framed so as to prejudice, embarrass and delay the fair trial of the action; and inasmuch as same, though purporting to be in confession and avoidance of the action, only answered part thereof, and neither traversed, nor confessed and avoided, the residue of the plaintiff's claim.

The plaintiff, by the first paragraph of his summons and plaint, sought to recover the sum of £116. 16s., for rent alleged to be due to him by the defendant under a lease. The defence objected to was as follows:—"The said Richard Finney appears and takes "defence to the action of said plaintiff, and says, as to £58. 8s., "parcel of the sum claimed in the first count of said summons and "plaint, that the indenture of lease, by which the demise in said "count mentioned was made from said plaintiff to said defendant, "contained the following covenants upon the part of the defendant, "namely," that the defendant, his heirs and executors, &c., would, during the continuance of the demise, maintain the said premises,

To an action for £116. 16s., rent under a lease, the defendant, taking "defence to the action," pleaded, "as to £58. 8s., parcel of the sum claimed in the first count of the summons and plaint," certain matter in bar, concluding, "and therefore he defends the action."—*Held*, that this defence was embarrassing, as being in form pleaded to the entire cause of action, and not confessing, in terms, the portion left unanswered.

H. T. 1860.

*Eschequer.*DUN-
SANDLE
v.
FINNEY.

and all improvements thereon, in good and sufficient order and condition, and so yield up the same at the termination of the tenancy; and also that defendant would not plant the crops specified in any part of said premises, except the portion then in tillage without the consent in writing of the lessor, &c.; and further, that the defendant should not destroy the game, nor suffer others to do so, without the lessor's permission, and would prosecute to conviction any persons who should, without the lessor's permission, do so on said premises in pursuit of game; and the said Defendant Dunsandle did, for himself, his heirs, &c., covenant with the defendant, his heirs, &c., that until some default should be made in the performance of the said covenants or agreements, upon the part of the said defendant, his heirs, &c., to be kept, &c., or some or one of them, and so long as all and every the said covenants, &c., should be well and truly performed, &c., according to the true intent and meaning of said lease, he, the said plaintiff, his heirs, &c., should and would, from time to time, and at all times thereafter during the continuance of said demise, accept, receive and take the yearly sum of £58. 8s., in lieu and stead of the rent of £116. 10s. thereby reserved; and defendant saith that he has always, since the making of said demise, in all things well and truly performed, &c., all the said covenants and agreements, &c., and that there has not been any default made in the performance thereof, within the true meaning of the said lease.

The second defence traversed the breach of the covenants, which was the subject-matter of the complaint in the second count of the summons and plaint, and concluded generally, "and therefore he defends the action."

H. Conoannon, for the motion.

This defence is embarrassing, for the plaintiff cannot tell whether he can mark judgment or not, for £58. 8s. The plea professes to be an answer to the whole cause of action in its commencement, and concludes in the same way, "and therefore he defends the action." If it were meant to be a defence to only £58. 8s., it should have been expressly so limited, or the remainder of the cause of action

would have been in terms confessed. In *Garrett v. Waldron* (a), H. T. 1860. the Court of Queen's Bench set aside a defence by which it was left uncertain whether or not it was a defence to the whole cause of action.

Exchequer.
DUN-
SANDLE
v.
FINNEY.

The officer refused to allow judgment to be marked, as the defence appeared to go to the whole cause of action.

W. Ryan, contra.

The defence is limited to the £58. 8s. only, and it was intended that the plaintiff should mark judgment for the residue. The £116s. 16s. is a penal rent, and under the terms of the lease the landlord is bound to accept £58. 8s., if the defendant perform the covenants. We say he did perform those covenants, and that therefore only £58. 8s. is due, for which sum we are willing that judgment should be marked. As to the objection that the plea commences with the formal words, "takes defence to the action," we were bound to follow the form given in the schedule to the Common Law Procedure Act; but the matter of defence is expressly limited to the £58. 8s.; "and as to the £58. 8s., parcel of the sum claimed," &c. This motion is therefore unnecessary, for judgment might have been marked, and there is no pretext for the allegation that the plaintiff was embarrassed.

Cur. ad. vult.

FIGOT, C. B.

The case of *Garrett v. Waldron* decided that, whether such a defence as that now before us was or was not a defence applied to the whole action, but covering a part of it only, it was at all events uncertain and ambiguous, and ought to be set aside. We are all of opinion that we ought to follow that decision, not only because it is a direct authority, but also because we entirely concur in the rule which the Court of Queen's Bench there made. The interest involved in this particular motion is small. But it is of great importance that parties and their advisers shall not be exposed to delay, inconvenience and expense, in dealing with defences of this

(a) 9 Ir. Com. Law Rep., App., xxiv.

H. T. 1860.

Eschequer.

DUN-

SANDLE

v.

FINNEY.

nature. This is the second time that a motion has been rendered necessary in consequence of the same kind of inconvenience, imposed upon a plaintiff by the same fault in a defendant's pleading; for the present case is not distinguishable from that of *Garrett v. Walker*. I think it right, therefore, to state distinctly the grounds on which, in my judgment, such a pleading ought not to be permitted to stand.

The plaintiff is entitled to have such a defence pleaded as shall, in the first place, give to the plaintiff himself plain notice of what the defendant means to confess, and what he means to defend; and shall, in the next place, give to the officer plain and clear material for determining, on seeing the defence, and without a special application to the Court, when and for what the plaintiff is entitled to judgment. The plaintiff ought to be placed in such a condition that he may at once go to the officer, take his judgment for what he has confessed, and enter a *nolle prosequi* for the residue, or (if he prefers), contest what the defendant disputes, and take his judgment for the residue, without uncertainty or difficulty in determining what that residue is. It is obvious that this may be accomplished by so modifying the prefatory statement of the defence (of which form is given in Schedule B, No. 2, referred to in section 39 of the Common Law Procedure Act), as to confine it to that subject-matter of claim to which matter of defence is subsequently pleaded. It may be done by simply saying, that the defendant "takes defence to the action," save as to a specified portion of the cause of action alleged in the plaint, and by afterwards confessing that portion; or by saying that he "takes defence to the action," save as to so much of the cause of action alleged in the plaint, as is thereafter confessed—by then confessing that portion—and by then stating the matter of defence on which he relies as to the residue. And the defence may, in a similar way, confine the closing words of the defence, "and therefore he defends the action," by adding, "save as aforesaid," or "save as to what is hereinbefore confessed;" or by some equivalent expressions. All this may be done without omitting a word of the introductory or concluding parts of the form given in Schedule B, by merely adding a few words accommodating these

parts of the form to the circumstances of the particular case. In the present instance nothing could be easier than so to adjust the form to the facts. The defendant might have added, to the prefatory words, the words following, viz., "save as to the sum of £58, part of the sum of £116 demanded in the first paragraph of the plaint." He might then have confessed that part; and he might have proceeded to apply his matter of defence to the residue. Such a form of pleading, containing a confession of part of the plaintiff's demand, and a defence as to the remainder, was very common among the old forms. A precedent is given for it in 3 *Chitty on Pleading*, p. 909. ed. 1831. But it is impossible to sanction such a form as that which the defendant has here adopted. It uses a prefatory commencement adapted to a defence to the whole action; and it contains no express confession which might give a limited construction to that commencement. It is calculated to embarrass the plaintiff, if in no other way, by embarrassing the officer, and thus delaying the plaintiff in his suit. In the present instance such has been the result. The officer informs us that, seeing the defence in its commencement and in its conclusion apparently applied to the whole action, and finding no confession of any part of the cause of action expressed in the defendant's pleading, he did not feel himself at liberty to collate and construe the plaint and the defence, and to determine how far it did, or did not, leave uncovered a portion of the cause of action. He, therefore, refused to allow judgment to be marked for any part of the demand. He only performed his duty in so doing. But the result was, that an application to the Court for leave to sign such judgment became necessary; and that application is still pending. All this trouble and delay, and all the expense thus occasioned, would have been prevented if the defendant had expressed what, on this motion, he declares that he means, namely, to confess the portion of the cause of action which he desires not to defend.

The 9th Rule of the General Orders in England, of Hilary Term, 4 *W.* 4, was referred to in the argument. The object of that Rule was to dispense, in certain cases, with the formal commencement of pleadings by *actionem non*, &c., which was ultimately

H. T. 1860.
Exchequer.
 DUN-
 SANDLE
 v.
 FINNEY.

H. T. 1860. abolished by the English Common Law Procedure Act, 15 & 16
Eschequer. Vic., c. 76, s. 66. It is unnecessary to refer to the decisions which
 DUN- were made on that Rule; they were not quite uniform. They are
 SANDLE collected in the notes, 3 *Chitty on Pleadings*, ed. 1844, pp. 25 & 26;
 v. 32 n (c); *Jervis on the New Rules*, p. 123 n; and 1 *Pratt*
 FINNEY. *Archbold's Practice*, p. 261. Some doubt seems still to exist as to
 the manner in which a plea, without any introductory statement
 limiting its application to a particular count, and containing what
 in effect an answer to that count, is to be dealt with. But, it
 is said, in 1 *Archbold's Practice*, p. 261, that when "a plea begins
 "an answer to the whole declaration, but in truth the matter
 "pleaded be only an answer to part, the plaintiff cannot, even
 "although the plaintiff be under terms of pleading issuably, obtain
 "judgment for the part not answered, but should demur, or apply
 "a Judge for an order under the 52nd section of the Common Law
 "Procedure Act (England), to set aside the plea, or make the
 "defendant amend it, with costs." The latter alternative is that
 which we are called upon to act by this motion; and I think it
 that which we ought to apply to the defence before us. Coupling
 commencement both with what *is* contained in it, and with what
ought to be contained in it, but is not, I think, in the absence of
 distinct confession of the portion of the cause of action uncovered by
 this defence, that it is embarrassing, and in strictness ought to be set
 aside. The defendant, however, may have liberty to amend, by
 stating distinctly and in terms to what cause of action his matter of
 defence is applied, and what cause of action he confesses; and he
 must pay the costs of this motion.

FITZGERALD, B.

The difficulty in the way of the defendant is, that there is no
 express decision upon the point. If this matter were *res nova*, and
 came before me, I confess I would think it reasonably clear that
 this was a plea to part, and that the plaintiff was entitled to make
 judgment.

M. T. 1859.

Eschequer.

LAWRENSON v. HILL.

Nov. 16, 17.

H. T. 1860.

Jan. 20.

THIS was an action against Mr. Edward Eustace Hill, a Justice of the Peace for the county of Longford; and the case was tried before the Lord Chief Justice, at the Spring Assizes of 1859, for the county of Westmeath.

The summons and plaint contained four counts; and the first and second counts, upon which, and the defences thereto, the question in the case arose, were in trespass for a false imprisonment.

The first count alleged—"That the defendant, on the 24th day of March 1858, at Edgeworthstown, in the county of Longford, assaulted and beat the plaintiff, and gave her into the custody of a police constable, and then and there forced and compelled the plaintiff to go from and out of a certain building in the town of Edgeworthstown, in the said county of Longford, into the public street, and then and there forced and compelled her to go along and through divers public streets and roads from the said town of Edgeworthstown to a building in the town of Longford, known as the gaol of Longford, in the county of Longford, and then and there, without any reasonable and probable cause, imprisoned the plaintiff, and detained her in prison, and caused her to be imprisoned and detained in prison in the said gaol of Longford for a long time, to wit, from the said 24th day of March 1858 until the 7th day of April, contrary to law, and against the will of the plaintiff, whereby the said plaintiff was greatly injured," &c. The second count was substantially the same.

Plea to the first and second counts:—That before and at the time, &c., the defendant was one of the Justices of the Peace for

A warrant issued by a Justice, founded upon an information which discloses no criminal offence, cannot be sustained by proof that there was in fact parol evidence on oath given, which conveyed a criminal charge.

Trespass is maintainable under the 2nd section of the 12 Vic., c. 16, if, in the particular act of issuing the warrant, the Magistrate acted without or in excess of jurisdiction, although he had a general jurisdiction over the subject-matter of inquiry. In such a case the Magistrate is not protected by the 2nd section, although he *bona fide* believed that he was acting within his jurisdiction.

A pleading susceptible of one interpretation on demurrer, and another at

Nisi Prius, is embarrassing; and the Court, upon a question whether it was sustained by evidence, will construe it as it would have done upon general demurrer.

M. T. 1859.
Exchequer.
 LAWRENSEN
 v.
 HILL.

the county of Longford; and the defendant, as such Justice of the Peace, in the due discharge and execution of his duty, and within his jurisdiction, on the said 24th day of March 1858, attended the Petty Sessions Court held at Edgeworthstown, in and for said county of Longford; and the defendant, being then and there in discharge of his duty as such Justice, a charge was made against the now plaintiff, therein named Ellen Kennedy; and the said plaintiff having attended at said Petty Sessions, said charge was duly heard and adjudicated on, in the presence of this defendant, and William Francis Ryan, also a Justice of the Peace for said county of Longford; and upon the evidence and sworn testimony then and there adduced, and on information on oath duly made and tendered before him as such Justice of the Peace, he, the said Justice, did verily believe that the plaintiff had been guilty of a felony, that is to say, the offence of stealing a certain key, the property of one Willoughby Bond, Esq.; and thereupon the defendant says, in the execution of his duty, as such Justice of the Peace for the county of Longford, he did, on the said 24th day of March, thereupon duly issue his warrant, under his hand and seal, to the constabulary of Longford, directing them to lodge the said plaintiff, therein described as Ellen Kennedy, in the gaol of Longford, to abide her trial at the next Quarter Sessions to be held at Longford; and which said warrant the defendant afterwards caused to be delivered to one of the said constables, under which said warrant of commitment the said plaintiff, therein described as Ellen Kennedy, was imprisoned and kept in custody to abide her trial upon said charge, for the said time and times in said first and second count stated, which are, &c.; and the defendant avers in so doing he acted *bona fide*, as a Justice of the Peace, and within his jurisdiction, and in the belief that the plaintiff was guilty of the charge of feloniously obtaining said key; and the defendant says the said acts were not done maliciously, or without reasonable and probable cause; and under the said warrant of commitment the said plaintiff, called Ellen Kennedy, underwent no further or greater imprisonment, save and except in the ordinary course of law she was discharged.

Upon these pleadings the issue was, whether the justification of the defendant, pleaded to said first and second paragraphs, was true in substance and in fact? The evidence given at the trial was as follows:—On behalf of the plaintiff, there was proved a summons served upon her, entitled “W. Willoughby Bond, Esq., complainant; Ellen Kennedy, defendant. Petty Sessions District of Edgeworthstown, county of Longford. Dated the 23rd day of March 1858,” and signed by the defendant. The complaint recited in this summons was, “That the said Ellen Kennedy has the key of a house in her possession, the property of the complainant, and would not give it up to Mr. Fullam, complainant’s agent.” In pursuance of this summons the plaintiff attended on the 24th day of March 1858, at the Petty Sessions Court of Edgeworthstown. The plaintiff having refused to give up the key, an information, similarly entitled as the summons, was made by Michael Fullam, which was as follows:—“Saith on his oath he is agent to Willoughby Bond, Esq., of Farra. Applied to the defendant for the key of the house in Edgeworthstown, lately in the possession of Anne Halfpenny, deceased, who stated she had an undertaking with Mr. William Slator about it, and would give said key to him; that subsequently she refused to give said key to him, on the ground that it might be the means of causing her to be removed from her own house; and that informant saith said key has not been given up, and still remains in her custody. The informant demanded the key referred to on Monday the 22nd of March instant, and was refused.—(Signed)—Michael Fullam.” The defendant thereupon issued a warrant, directed to the constabulary of Longford, and which was in the following terms:—“Form E.C.—Petty Sessions (Ireland) Act 1853, 14 & 15 Vic., c. 93.—Warrant to commit (or detain) for trial—(Title)—Whereas a complaint was made on the 24th day of March, on the oath of Michael Fullam, of Farra, that on Monday the 22nd of March 1858, the aforesaid Michael Fullam demanded the key of a house, the property of Willoughby Bond, Esq., from Ellen Kennedy, which she refused to give up said key; and the said Ellen Kennedy to abide her trial at the next quarter Ses-

M. T. 1859.

Exchequer.

LAWRENSON

v.

HILL.

M. T. 1859. *Eschequer.*
LAWRENSON
 v.
HILL.

"sions to be held at Longford, on the 7th of April 1858: this
 "to command you, to whom this warrant is addressed, to lodge
 "the said Ellen Kennedy, of Edgeworthstown, in the gaol
 "Longford, in the said county of Longford, there to be imprisoned by the keeper of said gaol as follows; and for this the present warrant shall be a sufficient authority. To all whom it may concern."
 (Signed) "EDWARD EUSTACE HILL."

Proof was then given that the plaintiff had been arrested under this warrant, and imprisoned for fourteen days; and that at the next Quarter Sessions a bill of indictment against her was sent up to the Grand Jury, which was ignored.

For the defendant, Mr. Hill was examined on his own behalf, and a Mr. Ryan, a brother Magistrate; and their evidence was that Fullam was examined orally on oath before them, at the Petty Sessions, in the presence of the plaintiff, and swore that he had discovered that the key in question was taken clandestinely and unlawfully from an unoccupied house, the property of Mr. Bond, and that the plaintiff refused to give up said key; and that they believed, upon the oath of Fullam, that the key was clandestinely and unlawfully taken by her, and that a felony was committed by her, in consequence of such sworn testimony.

His Lordship told the jury that there was evidence to sustain the defendant's justification as pleaded, and that, if they believed it no action for false imprisonment could be maintained against the Magistrate on the ground of any informality or error in the proceedings.

Counsel for the plaintiff objected to this direction; and the jury having found a verdict for the defendant, *B. M. Kelly*, in Easter Term, obtained a conditional order to set aside the verdict for the defendant on the first issue, and for a new trial, on the ground of misdirection, and because the defendant's first defence was not sustained in evidence.

G. Battersby (with him *J. T. Bull* and *E. P. Levinge*) showed cause.

The evidence at the trial fully sustained the justification. *We*

submit that if the Magistrate, upon the evidence before him, *bona fide* believed that a felony had been committed, he is protected by the 12 *Vic.*, c. 16. It is admitted that a complaint was made, and the Magistrate cannot be held liable for having formed an erroneous judgment on the facts proved before him. It may be that neither the summons, information nor warrant disclose sufficient grounds to justify the commitment; but the defendant acted on the evidence of Fullam, given on oath in the Petty Sessions Court, as well as on the complaint recited in the summons and information. This he was quite justified in doing, and that evidence ought to be admitted, *quantum valeat*, in support of his justification. If such evidence were excluded, the result might be, that a mere omission in the framing of the summons and information would expose a Magistrate to liability, although there might have been admittedly abundant evidence before him to justify the act complained of. That being so, the case falls precisely within the principle of *Cave v. Mountain* (a). There the Magistrate acted solely upon hearsay evidence; and Lord Chief Justice Tindal, in giving judgment, said, that no case could be found in which a Magistrate, acting within his jurisdiction, had been held liable, in an action of trespass, for a mere error of judgment.

He cited *Little v. Clements* (b); *Gelan v. Hall* (c); *Weller v. Toke* (d); *Barton v. Bricknell* (e); *Wedge v. Berkeley* (f); *Horn v. Thornborough* (g); *Ballinger v. Ferris* (h); *Regina v. Christopher* (i).

E. M. Kelly and *W. J. O'Driscoll*, in support of the conditional order.

There are two questions in this case:—First—was the plea of justification sustained in substance and in fact? and, secondly, was

M. T. 1859.
Eschequer.
 LAWRENSON
 v.
 HILL.

(a) 1 Man. & G. 257.

(c) 27 L. J., M. C., 78.

(e) 13 Q. B. 393.

(g) 3 Exch. 848.

(b) 1 Ir. Com. Law Rep. 194.

(d) 9 East, 364.

(f) 6 Ad. & Ell. 668.

(h) 1 M. & W. 632.

(i) 28 L. J., M. C., 35.

M. T. 1859. *Erchequer.* the direction of the learned Judge right in point of law? The must be read as if we were now considering it upon demurrer: *Ruckley v. Kiernan* (a); *Lindsay v. O'Neill* (b). LAWRENSON v. HILL. meaning must be that a charge of felony was made against the plaintiff at Petty Sessions; that the defendant investigated that charge and in the execution of his duty issued his warrant. The summary clearly does not support those averments: 14 & 15 Vic. c. 93, s. 1. At farthest, it only states a complaint which would support an action of trover. The information also discloses no offence, and is not an information at all: *Regina v. Sutton* (c); and the warrant carries the case no farther: *Rourke v. Pepper* (d). This constitutes the whole of the legitimate evidence, and it contains no allegation of a felony having been committed: *Caudle v. Seymour* (e); *Horr v. Gosset* (f); *Regina v. Bolton* (g); *Grady v. Hunt* (h); *Phelan v. Greatrex* (i); *Leary v. Patrick* (k); *Lalor v. Bland*. These authorities show that the parol testimony of the Magistrate as to the oral evidence of Fullam, at the Petty Sessions Court, cannot be relied upon to supply the defect in the summons, information and warrant. The act, therefore, of the Magistrate is clearly one done without jurisdiction, and trespass is maintainable under the 2nd section of the 12 Vic., c. 16. Even if the parol evidence of Fullam had been taken in the shape of deposition, and embodied in the warrant, the defendant would not be protected: it could not, by any reasonable interpretation, be construed to impute a charge of felony. *Cave v. Mountain*, therefore, does not apply.

J. T. Ball, in reply.

The question whether a Magistrate has acted within his jurisdiction.

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| (a) 7 Ir. Com. Law Rep. 75. | (b) 5 Ir. Com. Law Rep. 461. |
| (c) 5 Q. B. 493. | (d) Sm. & Bat. 346. |
| (e) 1 Q. B. 889. | (f) 10 Q. B. 359. |
| | (g) 1 Q. B. 68. |
| (h) 5 Ir. Com. Law Rep. 445; S. C., 1 Ir. Jur., N. S., 10. | |
| (i) 2 New Sess. Cas. 429. | (k) 15 Q. B. 266. |
| (l) 8 Ir. Com. Law Rep. 123. | |

action depends on this, whether, in any conceivable state of facts, the Magistrate could have done what he did? There must be some evidence before him; and though, if the evidence be insufficient, the warrant may be illegal, still the Magistrate will be protected, if, in any conceivable state of facts, he could have done what he did: *Iazeldine v. Grove* (a). In this case there is a conceivable state of facts in which the order of the Magistrate would have been right. There was a complaint; there was evidence on oath before him of certain acts done, and upon that he arrived at the conclusion that a felony had been committed. For the purposes of bringing him within the protection of the 12 *Vic.*, c. 16, it is sufficient that he believed in the correctness of that conclusion. The fact that he formed an erroneous or hasty judgment is only evidence of want of reasonable and probable cause. If the evidence amounted to the statement of a crime, the Magistrate is not liable for not inquiring into the truth or falsehood of the facts stated. It was allowable to show that there was sworn testimony before the Magistrate, in addition to that disclosed by the warrant. He was not bound solely to act on the written evidence. The statements in the documents raise a presumption that a felony may have been committed, and that presumption may be fortified by proof of further evidence, which was, in fact, before the Magistrate. He also cited *White v. Carter* (b), and *Haylock v. Sparke* (c).

M. T. 1859.
Eschequer.
 LAWRENSON
 v.
 HILL.

Cur. ad. vult.

The judgment of the Court was delivered by PRIGOT, C. B.

H. T. 1860.
 Jan. 20.

This case involves some important considerations with respect to the duties of Magistrates; to the protection given them by law when sued; to the course of pleading adopted by the defendant; and the evidence given on the trial.—[His Lordship stated the facts.]—The duty of a Magistrate, in dealing with a party charged with a criminal offence, is prescribed by the 10th, 14th and 15th sections of the 14 & 15 *Vic.*, c. 93. He is bound, before he commits for trial (among other matters), to take down the evidence against

(a) 3 Q. B. 997.

(b) 3 Bing. 78.

(c) 1 Ell. & Bl. 471.

H. T. 1860.
Eschequer.
 LAWRENSON
 v.
 HILL.

the accused, in the shape of written deposition on oath. This is a new law. It has been, as to felony, the law in England since 2 & 3 *Phil. and Mary*, c. 10, and in Ireland since the 10 *Car. st.* 2, c. 18; and it has been extended to misdemeanours by statutes. The committal of the Magistrate must be by writ (sec. 15); and the very nature of a warrant requires that it state the cause of the committal: 1 *Burns' Just.*, p. 779; 1 *H. P. C.*, p. 111, part 2, c. 13; 2 *Inst.*, pp. 52, 591; and see the 1st and 22nd answers of the Judges to the *Articuli Cleri* (2 *H. pp.* 615, 616). In the present case the plaintiff was summoned to appear at Petty Sessions to answer, not to a criminal charge, but to a complaint of a civil wrong. On her appearance before the defendant and another Magistrate, Michael Fullam made a deposition in writing, on oath, sustaining the complaint contained in the summons, to a certain extent, but to a certain extent only, for it did not show that either the house, or the key, belonged to Willoughby Bond. It contained absolutely nothing which, by itself, could convey a charge of a criminal offence. Upon this information the defendant issued the warrant of committal under which the plaintiff was imprisoned, and which was (irrespective of some informalities that I do not now notice) in substantial conformity with the summons and the information; for it stated the only cause of committal, a complaint, that the agent of the owner of a house had demanded the key of it from the plaintiff, and that she had refused to give the key. It is perfectly clear, so far as is shown upon the summons, the information and the warrant, that the defendant committed the plaintiff to prison for an alleged civil wrong, the proper subject, according to the old forms, of an action of *detinue*, of *trover*, or perhaps of *trespass*, but in respect of which he was wholly without jurisdiction.

The oral testimony which (according to the evidence of the defendant, and of Mr. Ryan, at the trial) was given before the deposition on oath by Fullam, on the occasion of the plaintiff's committal, and before the warrant was issued, could not, in my judgment, justify that committal. The statute requires the evidence against the

accused to be taken by "depositions on oath, *and in writing*" (a). **H. T. 1860.**
Eschequer.
LAWRENSON
v.
HILL.

This provision is as essential for the general purposes of the administration of justice as it is for the particular end of protection to the accused: and it would be not merely to evade, but to frustrate, the Act of Parliament, to hold that the warrant could be sustained by *oral proof*—dependent upon fleeting memories, and probably with conflicting testimony—of *oral evidence*, alleged to have been given before the Magistrate previously to the committal, but excluded from the written sworn "*information*," to which, as the foundation for the committal, the warrant, in reciting "the complaint on oath," must be taken to refer. If there were no written deposition, the committal would have been without authority of law, whatever might have been the oral evidence, for it would have been in direct violation of the mandatory provision of an Act of Parliament. If the deposition contain nothing that by any intendment can convey a charge of a criminal offence, the oral evidence, which is not contained in it, is as incapable of sustaining the committal as if there had been no written deposition at all. The case of *Caudle v. Seymour* (b), although it dealt not with a warrant of committal, but a warrant to enforce the appearance of the accused, well illustrates the duty of a Magistrate in taking evidence upon a criminal charge. Lord Denman there held that, "to give him jurisdiction over the individual accused, there should have been an information properly laid." For these reasons it is, in my judgment, perfectly clear that the issuing of the warrant in this case, not founded upon an information on oath *and in writing*, imputing a criminal offence, but founded on a complaint of an alleged civil wrong, was an act done by the defendant without any jurisdiction or legal authority.

But then the question arises, which was much discussed before us, whether the issuing of the warrant was, or was not, an act for which the defendant could be sued, as for a trespass, under the 2nd section of the 12 *Vic.*, c. 16? The 1st section of that statute provides that, "For any act done by a Justice of the Peace, in the execution of the duty of such Justice, with respect to any matter within his jurisdiction as such Justice," he shall be sued, if at all, by "an

(a) Sec. 14.

(b) 1 Q. B. 889.

H. T. 1860. Exchequer.
 LAWRENSON
 v.
 HILL.

action on the case as for a tort;" and in such action it is alleged and proved, that the act complained of was done maliciously and without reasonable and probable cause. The 2nd section provides, that "For any act done by a Justice of the Peace in a matter of which, by law, he has not jurisdiction, or in which he shall have exceeded his jurisdiction," a party aggrieved thereby (in certain cases, of which the present is not one) may sue for damages which might have been done before the passing of the Act. The two first paragraphs of the plaint before us (on which only the questions in the present case arise) complain of trespass and false imprisonment, and must be sustained, if at all, under the 2nd section.

For the defendant it is contended that, whatever be the ground upon which the action is brought, whether upon the legality of the warrant, or the oral evidence of the plaintiff, or upon the evidence of the jury, it is stated that upon which, if the evidence had been reduced to a written deposition, and if the warrant had contained a charge of felony in due form, the defendant would have had jurisdiction to commit; and it was argued that, therefore, the issuing of the warrant was an act done in a matter within the defendant's jurisdiction as a Magistrate; and, if that was so, then, it was argued that the action cannot be brought under the 2nd section. On the part of the plaintiff it was, on the contrary, insisted that, although proper evidence the Magistrates would have had jurisdiction to commit the plaintiff for felony, in the matter of the inquiry was had before them, yet, in the particular matter of this warrant, the issuing of it was "an act done by the defendant, in a matter in which he had not jurisdiction;" or, at all events, "in a matter in which he exceeded his jurisdiction." The question thus raised is whether, with a view to the application of the 2nd section of the statute, the "matter" in which the defendant acted is to be considered as consisting of the whole transaction of the inquiry before him, in which he had a general jurisdiction to commit for felony, or as consisting of the act of issuing the warrant for the plaintiff's arrest, which was done without or in excess of jurisdiction? As to the question of authority, as well as upon the reason of the thing, in the judgment the latter is the proper mode of treating the matter in question; and the present action is sustainable within the 2nd

section of the statute. A similar question to that which I have here stated was presented, though in different ways, in the case of *Barton v. Bricknell* (a), and in a case previously decided, though subsequently reported, of *Leary v. Patrick* (b). H. T. 1860.
Eschequer.
LAWRENSON
v.
HILL.

In *Barton v. Bricknell*, which was an action of trespass, the defendant, a Magistrate, convicted the plaintiff for Sunday trading, in a penalty of £5, and eleven shillings costs, to be levied, if not paid, by distress and sale of the plaintiff's goods. The conviction was quashed on *certiorari*, in *Reg. v. Barton* (c), on the ground that it contained a further adjudication, viz., that, "in default of sufficient distress," the plaintiff "should be put in stocks for two hours, unless the penalty and costs were sooner paid." Before the conviction was quashed, the penalty and costs were levied by distress of the plaintiff's goods; and for this distress the action was brought, after the quashing of the conviction. The plaintiff had not been put in stocks. The plaintiff's Counsel contended that the case fell within the very terms of the 2nd section of the 11 & 12 *Vic.*, c. 44 (*Eng.*), to which the 12 *Vic.*, c. 16 (*Ir.*), so far as relates to the present question, corresponds; for that the act complained of was done in a matter in which the defendant had exceeded his jurisdiction. The defendant's Counsel in argument admitted, and the Court in giving judgment considered, that the case was within the literal expressions of the 2nd section. But it was argued for the defendant that the 1st section protected Magistrates from actions of trespass for any act done with respect to a matter within their jurisdiction; that the act there complained of was the levying, by distress, of a penalty and costs, which was an act within the defendant's jurisdiction, and was, therefore, protected by the 1st section; that the 2nd section was, if construed literally, not consistent with the 1st; but that, giving it a reasonable construction, it meant that the action (that is, an action in the form allowed by the 2nd section) shall lie where the act complained of was in excess of jurisdiction; and of this opinion were the Court. Mr. Justice Coleridge, after quoting the words of

(a) 13 Q. B. 393.

(b) 15 Q. B. 266.

(c) 13 Q. B. 389.

H. T. 1860.

Eschequer.

LAWRENSON

v.

HILL.

the 2nd section, said :—" I am not prepared to deny that the present case falls within the literal meaning of these words: "this is an act done under a conviction in a matter in which the defendant has exceeded his jurisdiction. But if we give the words their full literal meaning, they contradict the 1st section. We must, then, try to construe them so as to give effect to the whole Act; and I think we do this if we confine section 1 to cases in which *the act by which the plaintiff is injured* is an act in excess of jurisdiction; for instance, if the plaintiff in the present case had been put in the stocks under the 1st section, alternative, and the action had been brought for that; in such a case, probably, trespass might have lain: as it is, I think it does not." The Court therefore held that the defendant was protected by the 1st section, and that the action did not lie under the 2nd section, because, by reason of the part of the Magistrate's act which was in excess of his jurisdiction, the plaintiff received no injury. In the case before us the act done without, or in excess of, jurisdiction is the very act which caused the imprisonment complained of. In *Leary v. Patrick*, the plaintiff was convicted, in a penalty of £5, of keeping an unlicensed place for the public performance of stage plays. A warrant of distress of the plaintiff's goods was issued, reciting the conviction for £5 penalty and 12s. costs. The conviction, as drawn up, was silent as to costs; and it did not appear, by any evidence, that any adjudication had been made as to costs. On appeal the conviction was quashed. An action was brought for false imprisonment in an arrest of the plaintiff pending the execution of the warrant for the distress, and also for taking and selling the goods under the warrant; and it was held that, although the Justices had plainly jurisdiction over the subject-matter, yet as they had issued a warrant for the levy of the costs, on which they had not, in fact, adjudicated, the warrant was illegal and in excess of their jurisdiction, and that the action of trespass was maintainable. The same principle of decision had been applied in *Caudle v. Seymour (a)* already mentioned, to the responsibility of a Magistrate, prior to the statute 11 & 12 Vic., c. 44.

(a) 1 Q. B. 889.

The principle of these decisions appears to me to be directly applicable to the case now before us. Assuming that the evidence deposed to by the defendant and by Mr. Ryan, at the trial, was given orally, on oath, before them by Fullam, and assuming (for the purpose of the argument) that they *had* jurisdiction, if in their opinion that evidence was sufficient to put the plaintiff on her trial, to commit the plaintiff, on a charge of felony, still they did *not* act in the exercise of that jurisdiction. They *did* commit the plaintiff upon a complaint of a civil wrong. In so doing, they acted in excess of jurisdiction; and, treating the matter in which they so acted (*viz.*, the issuing of the warrant under which the committal was had) as the Court in *Barton v. Bricknell* treated the alternative order to put the plaintiff in stocks, as the "matter" in which the Magistrates "exceeded their jurisdiction," I am of opinion that the case falls within the 2nd section of the 12 *Vic.*, c. 16, and that an action for a trespass was maintainable for the imprisonment under that warrant.

H. T. 1860.
Exchequer.
 LAWRENSON
 v.
 MILL.

It only remains to apply those principles to the defence pleaded to the two first paragraphs of the summons and plaint, and to the issue, whether the justification pleaded in that defence "is true in substance and fact?" The defence, which is very carefully and skilfully framed, is a curious sample of a pleading, the statements of which are shaped so as to intimate, by their context, what would be a defence in point of law; while the averments, taken separately, might be proved on the trial, consistently with a total absence of legal justification for the act complained of. It states that the defendant, a Magistrate, in the due discharge of his duty, and within his jurisdiction, attended a Petty Sessions Court, where a charge was made against the plaintiff. That is true; but the *nature* of that charge (the very point on which the whole question of the defendant's liability turns, the fact being that it was a complaint of a civil wrong) is carefully suppressed. It then states that the plaintiff having attended at said Petty Sessions, *said charge* was duly heard and adjudicated on, in the presence of the defendant and another Magistrate. That statement is true, with this exception, that it cannot, in strict truth, be said that a charge, in respect

H. T. 1860.
Eschequer.
 LAWRENSON
 v.
 HILL.

of which the Magistrates had no jurisdiction, was *duly* adjudicated on by them. It then states that "*upon* the evidence and sworn testimony then and there adduced, and *on information on oath*, "*duly made and tendered* before him as such Justice of the Peace, "he, the said Justice, did verily believe that the plaintiff had "been guilty of felony, that is to say, the offence of stealing a "certain key, the property of one Willoughby Bond, Esq." Any one reading this defence and giving to it a reasonable construction (such as would probably have been applied to it on general demurrer), finding the allegation of the "evidence and sworn testimony," coupled with and followed by the words, "and on information on oath," would take the fair construction of the pleading to be that, on a written information on oath, made in the usual and lawful form, the Magistrate drew the conclusion and formed his belief that the felony specified in the defence had been committed.

On that construction of the pleading it is wholly unsupported by the evidence. On the contrary, the case for the defendant, at the trial, was that his belief was influenced, not by what appeared in the written information (which contained no imputation whatever of a criminal offence), but by the portion of the oral evidence which was not contained in the information. Construed, however, strictly and literally, since information may be conveyed from one mind to another orally as well as by writing, the terms "information on oath" were capable of being interpreted to mean *oral information by sworn testimony*; and if the pleading were so interpreted, the evidence of the defendant and Mr. Ryan was plainly evidence for the jury in support of this allegation. But, in my judgment, we ought to construe the pleading in the manner in which we should, in order to sustain it as the defendant's pleading, have construed it on demurrer, and in the way in which alone the pleading could be maintained in point of law; and, binding the defendant by that construction, we ought to hold that the evidence failed in any manner to support the allegation. In this way only can we effectually discourage and frustrate a mode of pleading by which a party shall seek to speak one thing to the Court, if

his pleading be met by a demurrer, and another thing, at the trial, to the jury and the Judge. The defence then proceeds to aver, that "*in the due execution of his duty*, as such Justice of the Peace "for the county of Longford, he" (the defendant) "did, on the said "24th day of March, *duly issue his warrant*, under his hand and "seal, to the constabulary of Longford, directing them to lodge the "plaintiff, therein described as Ellen Kennedy, in the gaol of "Longford, to abide her trial at the next Quarter Sessions to be "held at Longford, and which said warrant the defendant afterwards caused to be delivered to one of the said constabulary." The important and essential part of this averment (and it is an essential part of the entire defence) is, that the defendant issued the warrant in the due execution of his duty as a Magistrate. If that statement be true, he acted within his jurisdiction in the act complained of—the two first counts are not within the 2nd section of the statute, and the defendant is within the protection of the 1st. If the evidence at the trial established that he acted in a matter in which he had not jurisdiction, or in which he exceeded his jurisdiction, then he did *not* issue the warrant in the due execution of his duty; and then the defence not only was not sustained, but was falsified by the evidence. For the reasons which I have already stated, my opinion very clearly is, that the summons, the information and the warrant showed that the defendant, in issuing the warrant, acted without, or in excess of, jurisdiction; that the effect of these documents was not, and could not be, successfully encountered by parol proof of the oral testimony given before the defendant, prior to the issuing of the warrant, and that, notwithstanding that parol proof, the defence was falsified at the trial.

I may here add, that the statement with which the defence concludes furnishes further illustration of the purpose for which it was framed; namely, the presenting to the Court, upon a demurrer, a meaning which the defendant might abandon at the trial. After completing the statement of the warrant, it proceeds thus:—"Under "which said warrant of commitment the said plaintiff, therein "described as Ellen Kennedy, was imprisoned and kept in custody "to abide her trial upon said charge, for the said time and times

H. T. 1860.
Eschequer.

LAWRENSEN
v.
HILL.

H. T. 1860. "in said first and second counts stated." What is the meaning of *Eschequer*.
LAWRENSON "upon said charge?" If it means the *felony* of which the plaintiff part of the defence states that the defendant believed her guilty, then the averment would appear to import that she was kept in custody, under a warrant, upon a charge of felony; and to support the pleading, the Court, upon the argument of a demurrer, would doubtless, have been called on by the defendants to read the writ of pleading as alleging a warrant, for felony, on an information, writing, on oath. But if the "said charge" meant the charge which in the first part of the defence, is stated to have been made against the plaintiff, then it would, at the trial, be satisfied by the proof of the charge which was *in fact* made in the summons, and which was for nothing but a civil wrong.

The defendant's Counsel relied on the rule applied in the numerous class of authorities in which, where a statute requires a notice of action to be given to a Magistrate, before suing him for an act done in the execution of his office, it has been held that he is entitled to the protection of such notice, if he did the act complained of under the *bona fide* belief that he was acting in the execution of his office. The Courts have so held, because otherwise the protection would be given wherever it was not required; for if the defendant, in fact and in law, did the act complained of in the execution of his office, and in pursuance of his legal authority, the plaintiff must, on that ground, and irrespective of any want of notice, fail in his action. And the privilege which the statutes containing provisions of this kind confer, of tendering amends, can only apply where the Magistrate has acted illegally. These authorities apply to the 8th and 9th sections of the 12 Vic. c. 16; but have no application whatever to the 2nd. The 2nd section gives the right of action where the Magistrate "has no jurisdiction," or "shall have exceeded his jurisdiction." We cannot, upon those clear words, attach a proviso which the Legislature has not enacted, and determine that jurisdiction is acquired by a mistaken belief in its existence.

For the reasons which I have stated, I am of opinion that there has been a miscarriage at the trial. The jury, in my judgment, ought not to have been directed, as I understand (so far as I can

collect from the report of the learned Judge), they, in effect, were to find for the defendant, if they believed the evidence of the defendant and Mr. Ryan. On the contrary, in my opinion, they ought to have been directed, upon the other evidence (as to which I do not understand that there was any controversy in fact), to find for the plaintiff on the negative of the issue; that is, that in substance and fact the defence was not true. In so holding, I wish to guard myself from being supposed to give any sanction to some of the arguments which have been addressed to us in support of the view on which I now cast my judgment. It is perfectly true that, under the 10th and 11th sections of the 14 & 15 *Vic.*, c. 16, a warrant to *enforce appearance* must be preceded by an information or complaint in writing, and on oath, containing the complaint which the warrant requires the party to answer. But I wish to lend no sanction to the opinion that if, on inquiry on oath before Magistrates, upon the appearance and in the presence of a party charged with a specified offence (for instance an assault), it appears in evidence that the party accused is guilty of another and distinct offence (for instance, rape, robbery, or murder), of which there was no previous formal charge, the Magistrates would not have full jurisdiction, on an information properly framed, and embodying that evidence, to commit the party for trial for the offence imputed in the new accusation. To hold that they would not have such authority would be, in some instances, to paralyse the administration of justice. Upon such new accusation, indeed, thus suddenly brought against him, great care ought to be taken to allow the accused ample time and opportunity for showing that he ought not to be put on his trial at all on such charge, or that, if it be a charge of felony, he ought to be admitted to bail. But it is unnecessary to advert to this topic further. The point does not arise for our decision; for the information and warrant before us dealt, not with *any* criminal offence, but with an alleged civil injury, and nothing else. There is, therefore, nothing whatever in the judgment which I am now pronouncing, inconsistent with holding, should the question ever arise, that if a party appears before a Magistrate, charged with one criminal offence, and if another offence be there imputed to him, on an information on oath and in

H. T. 1860.

Exchequer.

LAWRENSON

v.

HILL.

H. T. 1860.
Eschequer.
 LAWRENSON
 v.
 HILL.

writing, the Magistrates may lawfully deal with him as a person charged with that other offence, and commit him for trial, after examination. Supposing that they have that power, I must say that it ought to be exercised with a careful vigilance to guard against an accuser first putting forward a trivial complaint, in order to place the accused in custody, and then preferring a graver charge purposely withheld until then, in order that, when made, the accused should be unprepared to meet it. Again, it was contended (and I understood the argument), that even if the parol evidence, given by the defendant and by Mr. Ryan to have been given before by Fullam, had been given in the shape of a sworn written information, not only it would not have justified the defendant, but she would still be liable to an action of trespass, under the 2nd section of the statute. This proposition also is one on which the Court are not called upon to decide. The question would have arisen if the parol evidence had been set forth in a written deposition on oath, and a warrant had been issued for the committal of the plaintiff on a charge of felony. It may be that the evidence was insufficient to sustain a verdict of guilty on a trial. We ought, indeed, to presume the plaintiff to be innocent of such a charge, since the issue of indictment preferred against her at Quarter Sessions was ignored. It may be, too, that prudent, reflecting and right-judging men ought to have dismissed the complaint, and to have treated the proceeding of Fullam, or his employer, as an unjustifiable attempt to wield the criminal jurisdiction of Magistrates as an instrument for forcing the plaintiff to acquiesce in a claim of civil right, which, either on her own part or on that of some one else, she was then resisting. Still, if the evidence had been set forth in the information, and if, by any reasonable intendment, it could have been treated as conveying a charge of felony, it *might* be, that the defendant, on the ground that if he was wrong he committed an error of judgment only, might have derived protection against an action of trespass, from the principle of the decision of the Court, in *Cave v. Mountain* (a). There the plaintiff was arrested under a warrant of committal, issued by the defendant, on an information which contained nothing but hearsay

(a) 1 M. & G. 257.

evidence, tending, however (differing in that respect from the information before us), in a considerable degree (if it had been legal proof), to inculpate the plaintiff. But although Lord Chief Justice Tindal, in delivering judgment, observed, "That the information does not disclose any legal evidence of the guilt of the prisoner is undoubtedly true; it states nothing beyond mere hearsay, upon which neither Judges nor juries could act," he added, "But, at the utmost, this amounts to no more than an error in judgment on the part of the Magistrate; and no case can be found in which a Magistrate, *acting within his jurisdiction*, has been held liable, in an action of trespass, for a mere error in judgment." And the Court accordingly held, that the plaintiff could not sustain an action of trespass for an imprisonment under the warrant. In the present case the defendant can have no benefit from the principle on which *Cave v. Mountain* was decided; because here the information contained nothing which, by any possible intendment, could be construed to convey a criminal charge. The parol evidence of Fullam being excluded, it was the simple case of a proceeding which, upon the summons, the information and the warrant was, in substance and in form, the unlawful exercise of magisterial power to enforce, without jurisdiction, a civil claim.

H. T. 1860.

Eschequer.

LAWRENSON

v.

HILL.

KENNEDY v. HILLIARD.

E. T. 1869.

April 16.

June 11.

LIBEL.—The plaintiff, in the third paragraph of the summons and complaint, complained that defendant falsely and maliciously composed and published of the plaintiff, and caused and procured to be published of him, a certain false, scandalous, malicious and defamatory libel, in a certain document, entitled, Charles Kennedy, Esq., adminis-

No action lies against a party, for a statement in an affidavit, made by him as a witness, in the course of a cause, although such

statement was irrelevant, and was expunged from the affidavit as prolix, impertinent and scandalous, by an order of the competent Court.

Gildea v. Brien (H. T. 1821, C. P.) followed.

B. T. 1859. *Ex parte*.
KENNEDY
 v.
HILLIARD.

trator of John Kennedy, deceased, petitioner; Edward Kennedy respondent; Charles Kennedy, petitioner; Edward Kennedy and others respondents: in one part of which libel there was contained the following false, scandalous, malicious and defamatory matter, that is to say:—"And the administration granted by the Prerogative Court (meaning thereby administration of the goods and chattels of one John Kennedy, brother of the plaintiff) to the petitioner (meaning the plaintiff), being obtained by the petitioner upon a palpable mis-statement, and suppression of facts, as the petitioner (meaning the defendant) believes (meaning thereby that the plaintiff suppressed facts, and swore what was palpably false, in order to obtain administration), the petitioner (meaning the plaintiff), having induced the Court to believe that he had actually made personal searches and inquiry in the Sandwich Islands for the purpose of discovering his brother (meaning said John Kennedy), when, in point of fact, he (meaning the plaintiff) had never laid foot there, as defendant (meaning the defendant) believes, but, as appeared from the facts, had cautiously avoided that quarter" (meaning thereby that the plaintiff falsely swore that he had made searches and inquiries after his brother, which he did not make, to induce the Court to believe that his brother was dead, in order that he might obtain administration, and that it was by such false swearing and suppression that the plaintiff had induced the Prerogative Court to grant to plaintiff administration to his brother, which had been granted to plaintiff).

Plea.—That the publication therein complained of was in and by the said affidavit in the first defence to the first count mentioned, and that the document in said third count mentioned was and is said affidavit; and defendant, to avoid prolixity, refers to said first defence, and relies thereon, and prays that said first defence shall be incorporated into and deemed part of this defence, and claims his privilege as therein claimed and relied on; and the said first defence referred to is as follows:—That the plaintiff was the petitioner in the several cause petition matters pending in the High Court of Chancery in Ireland, in one of which Edward Kennedy was respondent, and in the other Edward Kennedy and others

were respondents, being the matters of Kennedy petitioner, and Edward Connor respondent, and Kennedy petitioner, and Kennedy and others respondents, and William Cullen, one of the solicitors, was the solicitor, and the defendant, being a barrister-at-law, was of Counsel for the plaintiff as such petitioner therein; and the plaintiff, as such petitioner in said matters, incurred certain costs to the said William Cullen, comprising charges for attendance, given to the plaintiff as such petitioner, and for a fee paid to the defendant as such Counsel by the said William Cullen, in reference to the said cause petition wherein Edward Connor was respondent; and the said William Cullen afterwards died, having duly made his last will and testament, and thereby nominated this defendant the sole executor thereof, and probate of the said will was afterwards duly granted forth of the proper Court to this defendant, who thereupon became, and still is, such executor and legal personal representative of the said William Cullen; and being such executor, and said costs being due and unpaid, the defendant, as his duty was, caused to be furnished to the plaintiff bills of costs in that behalf, and the plaintiff had furnished a requisition to tax said costs, pursuant to the course of said High Court of Chancery, and same were duly referred to Edward Tandy, Esq., one of the Taxing-masters of said Court, having lawful and competent authority in that behalf, to tax and ascertain the same; which said costs, being in process of taxation before said Master, were objected to in divers particulars by the plaintiff; and the said Edward Tandy, as his duty was, in the execution of his said office, proceeded to inquire and adjudicate thereon; and the defendant says that, whilst said bills of costs were so under taxation and adjudication, the plaintiff, on the 6th of May 1858, in order to sustain his said objections before said Taxing-master, filed an affidavit, duly sworn by him before the proper officer of said Court of Chancery, entitled in said cause petition matters, and afterwards caused notice to be given to the defendant that he had filed same, and that same would be used before said Master on said taxation; and thereby, amongst other imputations on the said William Cullen, and on the defendant, stated and suggested, in reference to said attendances and fees, that said attendances

R. T. 1859.

Eschequer.

KENNEDY

v.

HILLIARD.

E. T. 1859. had not been given by said William Cullen, and that said fee had been *bona fide* earned by this defendant, inasmuch as he then stated to the effect that certain services theretofore rendered him by another Counsel had rendered the preparation of a cause petition by the said William Cullen a light and easy task and that this defendant appeared to him to be acting more in the capacity of an assistant to the said William Cullen, in the conduct of his business as a solicitor, than as a barrister; in answer to said affidavit of the plaintiff, this defendant, being party to said taxation, as aforesaid, swore and used for the purpose, and in the course of said taxation, the affidavit in the said count mentioned to contain the alleged libellous matter, honestly believing the same to be true, for the information of said Taxing-master in Court, and in and for the purpose of said judicial proceeding which is the publishing and procuring to be published in the said count mentioned; and this defendant humbly insists he was as is privileged and exempt from any civil action in respect thereof and hereby craves the benefit of his privilege in that behalf.

Replication.—That true it is that the document in the third paragraph of the summons and plaint mentioned, and in which was contained the defamatory matter by said paragraph complained of, was and is the affidavit of the defendant in the first and fifth defences mentioned, and which affidavit plaintiff said was made and filed in the cause petition matters in the said first defence mentioned, upon the 7th of May 1858; and plaintiff admits that said defendant, in answer to said affidavit of plaintiff in the said defence mentioned, and in course of such taxation as in said first defence mentioned, swore and filed his said affidavit; but plaintiff saith that afterwards, by an order of the Court of Chancery, made in said cause petition matters, upon motion of Valentine Duff, in said order described as solicitor for said Osborne Hilliard the now defendant, which order bears date the 17th of May 1858, it was ordered that the prolixity, impertinence and scandal in the affidavit of defendant, filed the 7th of May 1858, and which affidavit is the same affidavit as is mentioned in the first and fifth defences, should be expunged by the Deputy Keeper of the

Rolls, or his clerk, pursuant to the General Order of the Court; and that accordingly, pursuant to said Order, the defamatory matter complained of in the said third paragraph was expunged by the said Deputy Keeper of the Rolls from the said affidavit; the said Valentine Duff, as solicitor for the now defendant, and said Osborne Hilliard, the now defendant, having themselves pointed out to such officer the portions of such affidavit to be expunged, pursuant to the said Order of the 17th of May 1858.

E. T. 1859.
Exchequer.
 KENNEDY
 v.
 HILLIARD.

Rejoinder.—That, after the making of defendant's affidavit in said defence referred to, the plaintiff filed in said Court of Chancery objections thereto, for impertinence and scandal, in respect of the passages containing the alleged libellous matter; and that the Taxing-master thereupon stayed the taxation of the costs in said defence referred to, until said objections should be disposed of; and that the defendant, for the sole purpose of expediting the taxation of the said bill of costs, and not because said objections, or any of them, were or was believed by the defendant to be tenable; but, on the contrary, having the advice of Counsel that same and every of them were wholly untenable, of his own accord, and without any judgment or debate of the matter, procured the order in said replication mentioned *ex parte*, by side-bar rule, according to the course of the said Court of Chancery, and without any intervention of the plaintiff.

Demurrer to the rejoinder.

J. T. Ball and *A. Keogh*, in support of the demurrer.

F. Maodonogh and *S. Ferguson*, contra.

The arguments of Counsel, and the cases cited, are fully stated in the judgments.

Cur. ad. vult.

PROOR, C. B.

Two questions have been raised for decision in this case; one upon the plaint and defence; the other upon the replication and rejoinder. The first question is, whether an action as for a libel

June 11.

E. T. 1859.
Eschequer.
KENNEDY
v.
HILLIARD.

lies for defamation contained in the defendant's affidavit, sworn in a judicial proceeding set forth in the defence? and this involves an inquiry whether there be an immunity from such an action, irrespective of the materiality or immateriality, for the purpose to which the affidavit was made, of the defamatory words? The second question is whether, if the circumstances under which the affidavit was sworn would otherwise confer immunity from an action for libel, the defendant is deprived of that immunity by the expunging of the defamatory words from the affidavit, in pursuance of an order of the Court of Chancery, obtained at the defendant's instance, and under the circumstances described in the replication and rejoinder. As to the first question, it is admitted (and I believe rightly) that no precedent exists of such an action as this having been successfully maintained. It is now about 260 years since, in the case of *Denport v. Simpson* (a), decided in the 38 & 39 *Eliz.*, the Court, as one of the reasons for holding that an action did not lie for the alleged false testimony of a witness, said:—"And, if he should be punished in case by this action, there would be some precedent of it before this time; but, seeing there is not any precedent found thereof, it is a good argument that it is not maintainable." The circumstances of that case are not directly in point with those before us; but the principle of decision has not been weakened by the lapse of two centuries and a-half. We are in effect called upon, in the present case, to extend the boundaries which have been hitherto assigned to actions for libel and slander. I confess I have some hesitation, in gravely discussing the question whether an action for libel lies against a party who makes an affidavit in support of his own case against an opposing suitor, in the regular course of a proceeding in a Court of Justice, for defamatory words contained in such affidavit. Since, however, the question has been raised, I think it better at once to deal with it. To encourage a doubt as to whether such an action as this is maintainable would, in my judgment, tend to paralyse the administration of justice. I take the following propositions, as to the points with which they deal, to state correctly the law in reference to immunity, on the one hand, and

(a) *Cro. Eliz.* 520; also reported in *Owen*, 158.

liability on the other, of a party making a false and defamatory imputation, written or spoken, to the injury of another. First; for what is stated by a party on his own behalf, or a witness in giving evidence in the ordinary course of a judicial proceeding, there is absolute immunity from liability to an action for libel or slander. Secondly; for what is stated fairly by a person in the discharge of a public or private duty, legal or moral, or in the conduct of his own affairs in a matter in which his interest is concerned, there is a qualified protection from such action, dependent upon the absence of actual malice: *Twogood v. Spyring* (a);—and see *Harrison v. Bush* (b). Thirdly; for the malicious prosecution of an unfounded criminal proceeding, and for the malicious abuse, in certain cases, of the process of the law in a civil-bill proceeding (for example, in the case of a malicious arrest, or of maliciously procuring to be issued a fiat in bankruptcy), an action may be maintained, provided the proceeding be prosecuted, not only with malice, but also without reasonable and probable cause.

E. T. 1859.

Eschequer.

KENNEDY

v.

HILLIARD.

On the two last of these propositions it is needless to observe. The first, which is now called in question in this action, is that with which we have to deal. It is, in my judgment, established by abundant authority, both of ancient and modern times.

The pleadings before us commence with the third paragraph or count of the summons and plaint. It complains, by its statements and innuendoes, of a libel, imputing that the plaintiff, in the Prerogative Court, had suppressed facts, and sworn what was false in certain matters specified, for the purpose of obtaining letters of administration to his deceased brother, John Kennedy. The affidavit, as stated in the defence and admitted on the record, was made in certain matters (Kennedy, petitioner; Connor, respondent—Kennedy, petitioner; Kennedy, respondent), in which the present plaintiff was petitioner, and in which William Cullen, deceased, whose executor the present defendant is, was the petitioner's solicitor. Upon a requisition of the plaintiff (the petitioner) to tax Cullen's costs in those matters, the costs were, after Cullen's death,

(a) 1 C., M. & R. 181; S. C., 4 Tyrw. 582.

(b) 5 Ell. & Bl. 344.

E. T. 1859. according to the course of the Court of Chancery, referred to the Taxing-master for taxation. In support of objections to the Taxing-master's bill, the plaintiff filed an affidavit. The defence alleges that that affidavit, "as

Eschequer.

KENNEDY

v.

HILLIARD.

"imputations on Hilliard and on the defendant (who was employed as the petitioner's Counsel in the matter), reference to certain attendances of Cullen as solicitor, the fee charged in the costs as having been paid to the plaintiff as barrister, that those attendances had not been given to him, and that the fee had not been *bona fide* earned by the defendant, and further stated, "that the defendant appeared to the plaintiff to be acting more in the capacity of an assistant to Cullen than in the conduct of his business as a solicitor, than as a barrister."

The defence, after stating in substance the foregoing, alleges that, in answer to this affidavit of the plaintiff, "the defendant, being a party to said taxation, swore and used, for the purpose and in the course of said taxation," the affidavit contained the libellous matter of which the third count complains, "believing the same to be true, for the information of said Taxing-master and Court, and in and for the purposes of said judicial proceeding." Upon the statements contained in this defence (which are admitted by the replication), it is plain that the defendant's affidavit formed a part of his proceeding, both as a party and as a witness, in sustaining his own interests as executor of Cullen, in a matter in which the Taxing-master was exercising between the plaintiff and the defendant, a judicial function.

In 2 *Inst.*, p. 228, *Lord Coke*, after commenting on the 34th section of the Statute of Westminster, and on the statutes of 2 Ric. c. 5, and 12 Ric. 2, c. 11, and stating that they applied to "extrajudicial slander," proceeds to say:—"And, therefore, if any man bring an appeale of murder, robbery or other felony, against any of the peers or nobles of the realme, &c., and charge them with murder, robbery or felony, albeit the charge be false, yet shall they have no action *de scandalis magnatum*, neither at the Common Law, nor upon either of those statutes, for the bringing of his action, or for affirming the same to his Councill, attorney or coun-

"siter for framing of his writ, or for speaking the same in evidence E. T. 1859.
 "to a jury, or for using of those words for the necessary commence- Exchequer.
 "ment or prosecution of his action judicially; and so it is a maxim KENNEDY
 "in law—*que home ne serra puny pur suer des briefes en Court le* v.
 "*Roy, soit il a droit, ou a tort*; and the reason thereof is, that HILLIARD.
 "men should not be deterred to take their remedy by due course of
 "law."

The principle here laid down by *Lord Coke* governed the decisions in several cases reported in the books. I shall mention some of them. They are collected in 1 *Vin. Abr.*, pp. 386 to 392; in *Com. Dig.*, tit. *Action on the Case for Defamation*; in Sir Robert Atkins' learned argument in the *Case of Sir William Williams* (a); and in 1 *Starkie on Slander*, pp. 239, *et seq.* In *Westover v. Daubinet* (b), reported as *Weston v. Dobniet* (c), a party libelled the defendant for defamation in the Spiritual Court, and produced a witness to prove the defendant guilty. The defendant, according to the course of that Court, made an allegation in writing that the witness's evidence ought not to be received, for that he was "a perjured man," and was perjured in a cause and at an Assizes specified. It was held, on demurrer to the declaration, in an action brought by the witness for this defamation, that the action did not lie; for if it did, "every man would be deterred from taking his exception to false witnesses." In *Eyres v. Sedgewicks* (d), reported under different names in *Cro. Jac.*, p. 601, 2 *Roll. Rep.*, pp. 195, 197, and *Palmer*, p. 142, "a supplicavit" issued out of Chancery to the Sheriff, against William Parry. The Sheriff issued a warrant to the defendant, as a bailiff, to arrest Parry, whom the defendant accordingly arrested, but negligently suffered to escape. The defendant then came into Chancery, and made a false affidavit, that the plaintiff and others violently rescued Parry; and thereupon the plaintiff was committed to the Fleet. The plaintiff brought his action against the defendant, charging him with having made this affidavit falsely and maliciously; and on a plea of not guilty, the

(a) 13 *State Trials*, 1364; *Com. Dig.* (F. 22).

(b) 1 *Roll. Abr.* 33, pl. 1.

(c) *Cro. Jac.* 432.

(d) 1 *Roll. Abr.* 33, pl. 2.

E. T. 1859. plaintiff obtained a verdict for £300 (a). The Court arrested judgment, holding (b) that "though the affidavit be false by which he was committed to the Fleet, and so to his great damage, because the affidavit was made in a legal course, *though he was not compelled by process to make it*, no action on the case lies for then every man would be deterred from making affidavits in such kind." In *Hunter v. Allen* (c), and in *Cutler v. Deon* (d), similar decisions were made, on exactly the same ground (the policy of not deterring parties from bringing their complaints before a Court of Justice), in actions brought for exhibiting affidavits on false allegations against the plaintiffs to bind them to good behaviour. In *Anyfeld v. Feverhill* (e), the same principle was applied, in prohibition against a proceeding by libel for defamation in the Spiritual Court. In 1 *Hawk. P. C.*, c. 28, s. 8 (1st book c. 73, s. 8, of the old edition), there is this passage:—"But it has been resolved, that no false or scandalous matter contained in a petition to a Committee of Parliament, or in articles of the peace, or in any other proceeding in a regular course of justice, shall make the complaint amount to libel; for it would be a great discouragement to suitors to subject them to public prosecution in respect of their applications to a Court of Justice." Several other similar decisions to those which I have cited are to be found in the books, applying the same rule of protection to what is said by a party on his own behalf in a Court of Justice, though the reason which I have mentioned is not always expressed. In *Boulton v. Clapham* (f), cited in 1 *Roll. Abr.*, pp. 38 and 87, as *Moulton v. Clapham*, the defendant, in the Court of King's Bench, in the hearing of the Court, the officers, and others, in reference to the plaintiff's affidavit, sworn for the purpose of having the defendant bound to his good behaviour, said, "there is not a word of truth in that affidavit, and I will prove it by forty witnesses." After a verdict for the plaintiff for £5, upon a plea of not guilty, the Court

(a) 2 Roll. Rep. 197.

(b) 1 Roll. Abr. 33, 87.

(c) Palmer, 188.

(d) 4 Coke's Rep. 14 b.

(e) 2 Bulst. 269; S. C., 1 Roll. Rep. 61.

(f) Sir W. Jones, 431, March 10.

arrested the judgment; "for the defendant, by said answer, made a defence of himself in the Court against the charge and accusation against him; and, therefore, it is justifiable, *being in a judicial way*;" by which, "I understand," said Mr. Justice Holroyd, when sitting this case in his judgment in *Hodgson v. Scarlett* (a), "that they" (the words) "were spoken in a Court of Justice." A similar decision had long before been made in *Lord Beauchamp v. Croft* (in 12 Hen. 7), of which there is a note in 3 Dy., p. 285, and a more full report in *Keilwey*, p. 26, in an action of *scandalum magnatum*, for an imputation that the plaintiff was "a forger of false deeds." The defendant, in his plea, justified, that the slander consisted in his bringing against the plaintiff "a writ of forger of false deeds;"—"And by the better opinion, in demurrer to the plea, the matter of justification is good, and out of the intention of the law, and the statutes for slander, &c., for no punishment was ever appointed for a *suit in law*, however it be false, and for vexation." A similar rule was, in *Lake v. King* (b), applied to a petition to a Committee of Parliament; the Court holding "that no action lies for it, although the matter contained in the petition was false and scandalous, *because it is in a summary course of justice*, and before those who have power to "examine whether it be true or false." These authorities, notwithstanding what was said in argument in *Revis v. Smith* (c), do not contravene the right to sustain the old action for a conspiracy, or the modern action for malicious prosecution or malicious abuse of legal process, by which the action for a conspiracy has been, in effect, superseded in modern times, as described in the note (4) to 1 *Saund.*, p. 229 b.

For a long lapse of time no report appears in the books, of an endeavour to sustain an action such as that with which we are now dealing. But in *Astley v. Young* (d), of which there is a MS. note in 7 *Bac. Abr.*, p. 313, and also a short report in 2 *Lord Kenyon's Cases*, p. 586, an action was brought for a libel, alleged to have been contained in an affidavit of the defendant. One count

E. T. 1859.
Eschequer.
KENNEDY
v.
HILLIARD.

(a) 1 B. & Ald. 264.

(b) 1 Saund. 131.

(c) 18 Com. B. 138.

(d) 2 Bur. 807.

E. T. 1859. (the second) of the declaration in that case stated, that an application had been made, in the Court of King's Bench (which is reported in *1 Bur.*, pp. 556, 561), against the defendant, a Justice of the Peace, concerning his refusal to grant a licence to one Day, for keeping a public inn and alehouse; that, on this application, Sir John Astley (the plaintiff) made an affidavit relating to such refusal; and that the defendant did "wickedly and maliciously make, exhibit, and publish to the same Court of our said Lord the King, before the King himself, a certain malicious, false and scandalous libel contained in a certain affidavit in writing," of the defendant, concerning the plaintiff and his affidavit. The declaration then set out the libellous matter, which consisted of this statement:—"And moreover he" (the defendant) "should have thought himself deserving of all which Sir John Astley hath so *falsely sworn against him*, the fear of any power upon earth could have moved him to swear judicially against his judgment." The declaration then alleged that the plaintiff "did not, in his affidavit, swear anything false against the defendant, nor ever was guilty of any perjury or of swearing whatsoever." To this count the defendant put in a plea setting forth the complaint made against him, and justifying; that he made the affidavit "in his own defence against the said complaint made to this Court against him for his refusal to grant such licence, and in answer thereto, and to the said affidavit of the said Sir John so made to corroborate and strengthen the said complaint as aforesaid." The plaintiff demurred generally to this plea. In support of the demurrer, the plaintiff's Counsel relied upon the admission, on the record, that the affidavit was made maliciously, with the intention to asperse the character of the plaintiff; upon the absence of a justification, on the ground that the imputation was true; and upon *the absence of any allegation that it was necessary for the defendant's defence* in the proceeding. Lord Mansfield interrupted him, and said, "Show that a matter given in evidence in a Court of Justice may be prosecuted in a civil action as a libel. The Court, indeed, before which such evidence is given may censure it." The case was fully argued by the Counsel for the plaintiff; but the Court gave judgment for the defendant, with-

ut calling for argument from his Counsel. In a case which is only reported in *Lofft*, p. 55 (*The King v. Skinner*), a motion was made to quash an indictment against a Magistrate, for scandalous words spoken by him to a Grand Jury in a General Sessions of the county. The words were, "You have not done your duty; you have disobeyed my commands; you are a seditious, scandalous, corrupt, and perjured jury." Lord Mansfield is reported to have said, "What Mr. Lucas" (the defendant's Counsel) "has said is very just; neither party, witness, counsel, jury, or judge, can be put to answer, *civilly or criminally*, for words spoken in office." In *Hodgson v. Scarlett* (a), the point decided by the Court was, that an action for defamation would not lie against a barrister for words spoken by him in a cause, *pertinent to the matter in issue*.

E. T. 1859.
Eschequer.
KENNEDY
v.
HILLIARD.

But in giving his judgment on that case, Mr. Justice Holroyd discussed the question of the immunity of the *party* from an action of libel or slander, for words written "in a course of justice;" and in a note at p. 245, which was stated by Mr. Baron Alderson, in *Gibbs v. Pike* (b), to have been furnished by Mr. Justice Holroyd to the Reporters, the question is further discussed; and the opinion is intimated that no action, as for libel or slander, can be maintained against the party or the Counsel, but that the proper form of complaint should be (in analogy to an action for the improper use of criminal or civil proceedings) by an action on the case, alleging malice, and the want of reasonable or probable cause. Several of the old authorities are cited in the note and in the judgment. The same opinion was intimated by the same learned Judge in a subsequent case of *Fairman v. Ives* (c); and Lord Chief Justice Jervis, in *Revis v. Smith* (d), expressed his concurrence in the views unfolded in the note of Mr. Justice Holroyd (e). The case of *Revis v. Smith* was an action in which a count was framed, not as for libel, but for maliciously, and without reasonable and probable cause, making a false affidavit in a cause pending

(a) 1 B. & Ald. 232.

(b) 1 Dowl. P. C., N. S., 414; S. C., 9 M. & W. 358.

(c) 5 B. & Ald. 645.

(d) 18 Com. B. 141.

(e) 1 B. & Ald. 245.

E. T. 1859. in the Court of Chancery, in which the defendant was a *per*
Eschequer.
KENNEDY containing injurious imputation against the plaintiff as an auctioneer
v. by means of which the Court declined to appoint the plaintiff
HILLIARD. auctioneer for the selling of certain estates. The defendant
 murmured to the count, and it was held that the action, for the count
 set forth in the count, did not lie. Mr. Justice Cresswell rested
 judgment on the grounds that the action was without precedent,
 that "it would be highly inconvenient to hold a man liable, when
 he gives evidence *which is relevant to the cause.*" Mr. Justice Cresswell
 treated the case as an attempt to introduce a new species of action,
 "in substance an action for defamation against a witness for giving
 evidence to the best of his belief in a Court of Justice." He said:
 "There is no averment that the defendant made the deposition
 knowing it to be untrue, but merely that he did it *fabulously*
 "maliciously, and without reasonable and proper cause. It seems
 "to me that the attempt is not supported by authority or principle
 "or by any sufficient analogy." Lord Chief Justice Jervis, however,
 appears disposed to rest his judgment upon higher grounds. In
 delivering judgment he said:—"This is a case where it is sought
 "to be charged in an action for defamation, *in a statement made*
 "*made by him in the course of justice.* I think it will be found
 "that the law is correctly laid down in Mr. Justice Holroyd's note
 "to the case of *Hodgson v. Scarlett*, and that *in no case*
 "*an action for defamation lie under such circumstances.* It is not
 "enough, however, upon the present occasion, to say that the
 "proceeding is totally without principle or example, and that the
 "must consequently be judgment for the defendant." It is quite
 plain that the action in *Revis v. Smith* was framed upon the sugges-
 tion in Mr. Justice Holroyd's note to *Hodgson v. Scarlett*, and upon
 the supposition that an action for libel would not lie, and with
 a view to apply, to an affidavit made by a party to a legal proceed-
 ing, the principle which governs actions for groundless and malicious
 prosecutions, and for the malicious abuse, in civil proceedings, of
 false allegations, of the process of the law.

Upon a review of the authorities, it appears to me that the law
 is correctly laid down in the following proposition with which Mr.

Starkie, in his *Treatise on Libel and Slander*, closes his description of this part of his subject, viz., "That an action of slander cannot " be maintained for anything said or otherwise published, by either " a Judge, a party or a witness, in due course of a judicial proceeding, whether criminal or civil." I take this to be a rule of law, not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded on public policy, which requires that a Judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a Court of Justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel. This principle is expressly recognised as the ground of decision in several of the older cases before referred to ; in *Lord Beauchamp v. Crofts* (a), in *Weston v. Dobneit* (b), in *Aier v. Redgwit* (c), in *Cutler v. Dixon* (d), and in *Hunter v. Allen* (e). One of the Judges, in the report of *Aire v. Sedgwick* (f), said, that if the action were maintainable, "it would be a means to scare a man from being sworn." It is of far less importance that occasional mischief should be done by slander under such circumstances, than that the whole course of justice should be enfeebled and impeded. The cases must be comparatively few, though they unfortunately will sometimes occur, in which substantial injury will be done. Much that appears in oral evidence and statement (and this applies still more strongly to affidavits and pleadings) receives no further publicity ; and it will often happen that the slandered party will be set right in the estimation of the persons who have learned the calumny in one part of the proceedings, by the refutation of it which is given in another. But if parties and their witnesses (and if these were not protected it would be difficult to apply a different rule for the immunity of Judges and jurors) were exposed to actions of this nature, not only would the cases be innumerable in which such actions would be brought (at least against parties and

E. T. 1859.
Exchequer.
 KENNEDY
 v.
 HILLIARD.

(a) 3 Dy. 285 b.

(b) 1 Roll. Abr. 33.

(c) 1 Roll. Abr. 33.

(d) 4 Co. Rep. 14 b.

(e) Palmer 188.

(f) 2 Roll. Rep. 198.

E. T. 1859. witnesses), but, in every case, the party and the witness would
Eschequer. be fettered in seeking or in aiding justice, by his own fears more or
KENNEDY less influencing him, according to the strength or the weakness
v. of his individual character, his position and circumstances in life
HILLIARD. and the known wealth, obstinacy or malevolence of the party
 offended.

It was urged, in the course of the argument, that the defence did not show that the passage in the affidavit, of which the plaintiff complains, was material for the sustainment of his case before the Taxing-master, and that, upon the face of it, it was irrelevant. In the first place, it is alleged in the defence, that the defendant swore and used the affidavit for the purposes of the taxation, honestly believing that it was true, for the information of the Master and the Court, and in and for the purposes of that judicial proceeding. The whole of the two opposing affidavits not being (of course) set out on the record, it does not present the materials for determining whether the imputations upon the plaintiff were, or were not, relevant to the maintenance of his case: and even if the two affidavits were looked to, as being, in effect, incorporated with the pleadings, by the 64th section of the Common Law Procedure Act, it would be necessary to refer to the bill of costs, the subject of taxation, to determine on the materiality of the defamatory words. Upon the face of the pleadings, therefore, the immateriality (if it exists) does not and cannot appear; and if the law be, that there is no immunity arising from the occasion on which the affidavit was made, unless the defamatory statement was material, then, according to the analogy of other defences, founded on privilege conferred by the occasion, the immateriality should be shown by the plaintiff, in order to take away the privilege which the occasion would otherwise confer. Thus, when it is shown that defamatory words complained of were spoken, or written, in the performance of a moral or legal duty, as in the common case of giving a character of a servant, the privilege arising from the occasion protects, unless it is removed by showing the existence of actual malice in the defendant.

But, in my judgment, the immunity of a party from an action

for defamation for what is said or written, or sworn by him on his own behalf in a judicial proceeding, attaches, whether what he states be or be not material. The reason of the rule of law which protects him applies to his statements on his own behalf, wholly irrespectively of their materiality. The difficulty is often great, even to one well skilled in the law, of determining upon the questions of the irrelevancy or immateriality of statements or of evidence. We need but open the pages of any treatise which collects the cases decided on this subject, in reference to trials at *Nisi Prius*, or to prosecutions for perjury, to perceive how doubtful that question often is. If a party, in making in person (as he may) a pleading or a statement of his own case in a Court of Justice, or in making an affidavit to sustain it, or if a witness (whether a party to the proceeding or not) shall be bound to determine, first, what are the exact questions at issue in the cause, and next, what is the exact line at which statement or evidence shall be material, and to determine this at the peril of an action for defamation if he be wrong, and if his words be defamatory, the protection which the law professes to give him would be nearly nugatory for its purpose. That purpose is, to give him the courage to resort as a party to the legal tribunals for justice, or, as a witness, to give his evidence before those tribunals, undeterred by the fear of a prosecution or an action. It is impossible that he can be free from that fear, if his immunity must depend upon his not mistaking what is not material for what is, and upon his rightly distinguishing what *is* from what *is not* libel or actionable slander. One of the Judges, in the report (*Palmer*, p. 145), of *Ayres v. Sedgwick*, is stated to have referred to a case, which he called *Chamberlaine's case*, decided in 7 & 8 *Bliz.*, in which it was held by the Court that, "If a witness makes a false oath upon the matter and point in issue, *to which he is sworn*, there no action on the case lies, because he is punishable for this by the statute, which would be frustrated if an action on the case would lie; otherwise, if he utters slanderous words in his oath, which are not to the issue or point to which he ought to give his evidence, an action lies." The reason seems a quaint one; the statute

E. T. 1859.
Exchequer.
KENNEDY
v.
HILLIARD.

E. T. 1859. referred to must be the 5 *Eliz.* c. 9, s. 6, which made per-
Exchequer. punishable by imprisonment and certain disabilities, and gave
 KENNEDY right of action to the party injured, in the event of the judge
 v. on a conviction for perjury being reversed. The case is
 HILLIARD. elsewhere reported; and in the same case of *Ayres v. Sedgwick*
 as reported both in *Palmer*, p. 144, and 2 *Roll.*, p. 198, and in a
 subsequent case, *Broad's case* (37 *Eliz.*), is referred to, in which
 action was brought against a witness for scandalous words; the
 defendant justified, "that he spoke them as a witness;" and it
 was adjudged that an action would not lie against him." This
 is cited without any qualification as to the words being or not
 being material; a qualification which does not appear in any of
 the other authorities to which I have referred. In the report of
Buckley v. Woods, in *Cro. Eliz.*, p. 248, a case of *Stanley v.*
Coursep (2 *Eliz.*) is referred to in the argument of Counsel
 as an authority for the proposition, that "where the witness goes
 "beyond the point in issue or question, and slandereth a third
 "person, action lieth." This case is nowhere reported; but, in
 the previous report of *Buckley v. Wood*, in *Cro. Eliz.*, p. 230, the
 same case (apparently) is stated to have been cited by the senior
 Counsel, by the name of *Stanley v. Curson* (8 & 9 *Eliz.*), but in
 very different terms: "One was brought in by *subpoena ad testi-*
ficandum, and upon his oath declared matter of infamy against
 "the plaintiff; yet, he coming in by the course of justice, and
 "he swear falsely, he may be punished for perjury, it was at
 "judged an action did not lie." With the exception of the
 loose reference to a case differently reported, in these two passages
 and the note of *Chamberlaine's case*, before mentioned, I can
 find nothing to warrant the qualification, to the protection given
 to a witness or a party, that it shall not apply unless the slander
 be material. If such a qualification were sanctioned by the law,
 it would, in one most extensive and important part of the admin-
 istration of justice, necessarily confided to persons not versed
 in the technical rules of law, lead to enormous inconvenience.
 It would expose a witness, swearing to an information, or giving
 oral evidence (often reluctantly and by compulsion), before Mr.

Magistrates, against persons charged with violations of the law, to the risk, not only of an action, but of an indictment, for libel, in every instance in which any statement not material to the exact charge made should be introduced into his information; and to an action for slander for every oral imputation on a party, not directly accused, but named by him in the course of the magisterial inquiry. The mischief of so determining would be so obvious and enormous, that no decision, involving such a result, ought to be made without direct authority; and for this there is none, except the short reference to the unreported cases mentioned in *Palmer* and *Cro. Eliz.*, of which the circumstances are unknown. On the other hand, in *Ram v. Lamley* (a), it appeared, in a declaration for slander, that the defendant applied to a Magistrate for a warrant against the plaintiff for stealing the defendant's ropes; and that on the Magistrate's saying to him "Be advised and look what you do," the defendant replied, "I will charge him with flat felony for stealing my ropes from my shop." Upon not guilty pleaded, there was a verdict for the plaintiff. But the Court arrested the judgment; "And the Court unanimously resolved, that these words "being spoken to the Justice of the Peace when he came for his "warrant, which was lawful, would not maintain an action; for "if they should, no other would come to a Justice to make complaint, "and inform him of any felony." In *Aire v. Sedgwick* (b), before cited, Dodridge, J., said, in his judgment, "If any one informs, or "gives evidence for the King (as any can), no action can lie "against him for his false information on oath." In *Maloney v. Bartley* (c), Baron Wood held that a voluntary affidavit, containing defamatory words, and sworn *extrajudicially*, would not be protected, and refused to compel the clerk who prepared it to give secondary evidence of its contents, as it might involve him in a prosecution for libel. But he held that, "had the affidavit been made in the "course of a judicial proceeding, no indictment or action could "be maintained against the clerk, *whatever might be the nature of "its contents.*" In another *Nisi Prius* case, *Trotman v. Dunn* (d),

E. T. 1859.
Eschequer.
 KENNEDY
 v.
 HILLIARD.

(a) Hut. 113.

(b) 2 Roll. Rep. 197.

(c) 3 Campb. 210.

(d) 3 Campb. 211.

E. T. 1859. the action (of slander) was for saying of the plaintiff "*He has been transported before*, and he ought to be transported again. *He has been robbing me of nine quartern loaves a-week.*" The defendant pleaded the general issue, and a justification that the words were true. It appeared that they were spoken when the defendant appeared at a Court of Conscience upon the summons, for wages of the plaintiff, a journeyman baker, whom the defendant had dismissed. A question arose, whether the words (which were spoken in the room where the Court sat) were spoken *before the Court* by the defendant in his defence or not; Lord Ellenborough said:—"If it had been proved that the defendant spoke these words in giving his defence to the Commissioners of the Court of Conscience, he *"would immediately have directed a nonsuit."* He left that question to the jury, telling them that, "if the defendant used the words in a judicial mode, for the purpose of his defence, he was justified." There was a verdict for the defendant. The words referring to the former transportation of the plaintiff appear to have formed no part of the defendant's defence against the demand for wages; yet the entire was plainly held, by Lord Ellenborough, to be within the protection which the occasion of speaking conferred.

In the case of *Astley v. Young (a)*, before referred to, it appears to me quite plain that Lord Mansfield considered that whether the defamatory matter in an affidavit made in a judicial proceeding was or was not material, it could not be made the subject of an action. It is true that, in dealing with an argument relied on by the plaintiff's Counsel, viz., that the slander contained in the defendant's affidavit was not alleged in the plea to have been necessary for his defence, and that it was "recrimination," not to defend himself, but to asperse the plaintiff, Lord Mansfield in his judgment observed that the allegation complained of "arose upon the very point in question, and was *not a collateral recrimination.*" But that Lord Mansfield did not rest his decision on that ground is plain, from the previous and subsequent parts of his judgment. He said:—"And as to the reason of the thing, there can be no scandal, if the allegation is material; and, if it is not, the Court before whom the

(a) 2 Burr. 807.

indignity is committed by *immaterial scandal* may order satisfaction, and expunge it out of the record, if it be upon record." This appears still more pointedly from the note of the case in 7 *Bac. Abr.*, p. 313, and 2 *Kenyon*, p. 536. In *Bac. Abr.*, the substance of the whole judgment is given in these words, and by Lord Mansfield, C. J.:—"If the denying in one affidavit of what is sworn in another should be deemed a libel, actions for libels would be endless; for an action might be brought in every case wherein there are contradictory affidavits. Witnesses must be at liberty to contradict each other; nor is there any necessity for an action in such case; *for if slanderous words which are immaterial* are contained in an affidavit, the Court has power to do complete justice to the party injured, not only by ordering satisfaction to be made, but likewise by ordering the slanderous words to be expunged." In 2 *Kenyon*, p. 537, Lord Mansfield is represented as calling on the plaintiff's Counsel "to show any case where words contained in an affidavit, &c., in a legal course of proceeding before a Court having jurisdiction, &c., had been held to make a libel, so as to subject a party to an action. Indeed the party, if perjured, may be punished criminally, *or the Court may expunge with costs.*" It is manifest that both Reporters understand Lord Mansfield as determining that the only remedy for "immaterial slander" in such an affidavit (that is, for slander, scandalous and impertinent) was, that it should be expunged, and that, either by being compelled to pay costs, or otherwise, the party guilty of the misconduct of placing it upon the files of the Court should be punished by a summary order. In a subsequent part of his judgment he refers to *Lake v. King (a)*, and to the case mentioned in 1 *Roll. Abr.*, p. 87, pl. 4 (which I before cited), as authorities which influenced his decision. It might be said that the Court cannot inquire into what is immaterial, and that, therefore, uttering slander not material to the question before the Court is equivalent to uttering it in a Court having no jurisdiction; and that *Buckley v. Wood (b)* decides that such slander is not actionable. The observations I have already

E. T. 1859.
Exchequer.
KENNEDY
v.
HILLIARD.

(a) 1 Saund. 136.

(b) 4 Coke, 14; S. C., 4 Cro. Eliz. 230, 248.

E. T. 1859. made appear to me to afford an answer to the reason of such
Exchequer. argument; and, with respect to *Buckley v. Wood*, the decision was
 KENNEDY reversed, not on the technical ground mentioned by *Lord Coke*, is
 v. because the action was held not sustainable; so stated in the note
 HILLIARD. *Gwinne v. Poole* (a), in the report of *Lake v. King* (b), and in
 the report of *Buckley v. Wood* (c); 1 *Hawk. P. C.*, c. 28, s. 1;
 1 *Saund.*, p. 131, n. (1); 4 *Coke*, p. 14 b, n. E, 8th ed. For these
 reasons, and upon these authorities, I am of opinion that, whether
 the defamatory matter contained in the affidavit in the present
 case was or was not material, the action founded upon it cannot be
 maintained, and that the defence contains a complete answer to the
 third count or paragraph of the summons and plaint. This disposal
 of the argument founded on the alleged estoppel of the order to
 expunge the defamatory matter. It is unnecessary to determine
 whether that order, as pleaded, operates as an estoppel, if the materiality
 of the defamatory words be (as I think it is) unimportant in
 reference to the defence of privilege. It certainly is not relied on
 as an estoppel by the replication; and this was essential, according
 to the old rules of pleading: 1 *Saund.*, p. 324, n. (4). I wish, how-
 ever, not to be understood as pronouncing any opinion as to whether
 or not the order of the Court of Chancery could at all conclude
 against the defendant, in reference to the immateriality of the defamatory
 words, as to whether or not that be a question for the Court to decide
 according to the opinion of Lord Campbell, in *Regina v. Lacey*,
 in a prosecution for perjury, for a jury; as to whether or not the
 rule which requires that an estoppel shall be expressly relied on
 in pleading has been abrogated by the Common Law Procedure Act,
 or as to whether or not, under the 14th section of that Act, we should
 take notice that the order (differently from what is stated in the
 replication, and apparently admitted by the rejoinder) is in itself
 an alternative, leaving it uncertain what part of the matter expunged
 was scandalous and impertinent, and what part was simply proved
 true, or as to whether the circumstances under which the order was
 obtained, as stated in the rejoinder, can or cannot qualify its effect.

(a) 2 *Lutw.* 1571.(b) 2 *Keble*, 832.(c) *Moore*, 705.(d) 3 *C. & K.* 26.

All these questions it might be necessary to consider, if it were held that the protection arising from the occasion of making the affidavit depended on the materiality or immateriality of the defamatory matter. But that not being so, the only remaining argument, as I conceive, on which the order of the Court of Chancery can be treated as an answer to the plea, is that, as the words have been expunged in pursuance of the order, they are, for the purpose of the defence, to be treated as if they were not in the affidavit. It appears to me to be quite impossible to hold that they form part of the affidavit, for the purpose of liability, and do not form a part of it for the purpose of defence. The publication of the libel was in the making of the affidavit; and, if there was a valid defence founded on the state of facts which subsisted when it was made, and while it continued to be published, that defence must be equally applicable, after the publication has ceased, as before it, to a claim for damages, which is made in reference to the same state of facts, and to the same times. It appears to me to be a most absurd and preposterous inconsistency to contend that the act of the Court which, in effacing the defamatory matter, makes its publication to cease, shall have the effect of, at the same time and by the same act, creating a liability which did not attach to the previous publication; and that this result is to be effected by holding that, for the purpose of defence, the defamatory matter was not in the affidavit in which, for the purpose of liability, it is the *plaintiff's own case* that it was. The effect of expunging the words is to prevent the reading of those words as part of the affidavit, wherever the affidavit is used to support the allegations which it contains, or to sustain which it is offered as evidence. But there is no rule of law by which the expunging of a part of it, in pursuance of an order of the Court, for any cause, precludes any party interested in doing so from showing what it once contained.

My Brother RICHARDS having mentioned to us a case which was on his memory, of *Gildea v. Brien*, decided many years ago in the Court of Common Pleas, I have obtained, by the kindness of the officers of that Court, access to the judgment.—[His Lordship stated the pleadings and proceedings as they appeared on the bill of

E. T. 1859.
Eschequer.
 KENNEDY
 v.
 HILLIARD.

E. T. 1859. exceptions].—The result of that case may be thus stated :—It was
Rechequer.
 KENNEDY
 v.
 WILLIAMS. action for libel, contained in certain passages of an affidavit sworn
 by the defendant in the Court of Chancery, but which passages had
 been expunged by the Master upon a reference, pursuant to an order
 of that Court. The defendant, besides several special pleas, pleaded
 also the general issue, under which the defence of privilege was, as
 a course, according to the practice then prevailing, open to him. It
 appeared that the affidavit in question was sworn by the defendant
 in resisting a motion made against him by a person named John
 Brien, the plaintiff in a cause in the Court of Chancery, in which
 Lowther Brien, the defendant in the action, was defendant, and
 in answer to an affidavit made in support of that motion by Gildea
 the plaintiff in the action for libel. One of several questions
 submitted to the jury, at the instance of the defendant's Counsel
 by the Judge who tried the case, was "whether the affidavit was
 "material and necessary for the defendant's defence, against a
 "motion for attachment?" The jury, on that question, found in
 the plaintiff in the negative. There was a verdict for the plaintiff
 and there was a bill of exceptions to the Judge's charge, in which
 notwithstanding various objections which it is unnecessary to men-
 tion, he told the jury that they were at liberty to find a verdict
 for the plaintiff. The Court, after considerable delay, instead of
 awarding a *venire de novo*, gave judgment for the defendant, "in
 "the said John Gildea take nothing by his said bill, but that he be
 "in mercy," &c.; manifestly acting on the same view of the statute
 relating to bills of exceptions in Ireland, 28 G. 3, c. 31, which
 was applied by the Court of Error in this country in *Leane v.*
Lord Trimlestown v. Kemmis (a), but which was corrected by the
 House of Lords in the same case, as reported in 9 Cl. & Fin.
 p. 749. I would interpret the decision in *Gildea v. O'Brien*
 judging only from the contents of the record, as a direct authority
 for holding that the immunity of the witness is not affected by
 the immateriality of the slander, unless the Court decided the
 case on the ground that the action could not be maintained after

(a) 1 Jebb & Sym. 567.

the Court of Chancery had expunged the slanderous matter from the affidavit, That the latter was the ground of decision, I would regard as most improbable; and the recollection of my Brother RICHARDS is, that the case was decided on the other ground. On the whole, I am of opinion that the demurrer ought to be overruled.*

E. T. 1859.
Exchequer.
 KENNEDY
 v.
 HILLIARD.

RICHARDS, B.

The substantial question in this case, divested of all technicality, with reference to the form of the pleadings, appears to me to be a very narrow one.

The action was brought in reference to matter stated in an affidavit filed in a certain proceeding in the Court of Chancery. It has been argued by the Counsel for the plaintiff that, although that is so, and although all affidavits and documents filed in the course of a judicial proceeding are protected, and cannot be made the subject of an action for libel, yet that this is an excepted case; or rather that the matter to which the affidavit relates is not within the protection of that privilege, because there has been a decision of the Court of Chancery on that very matter, and that the Court of Chancery has adjudicated that the matter complained of was not proper to be stated in that Court, and was not matter capable of being made use of in the judicial proceeding then pending; and

* NOTE.—Since this case was decided, the case of *Henderson v. Broomhead*, determined by the Court of Error in England, was reported (4 Exch., N. S., 569), ruling that no action lies against "a party who, in the course of a cause, makes an affidavit in support of a summons taken out in such cause, which is scandalous, false and malicious, though the person scandalised, and who complains, is not a party to the cause." Such is the marginal note of the case. In one part of his judgment Mr. Justice Erle says, that he does not concur in an argument urged at the Bar, that the slander complained of was irrelevant. He adds:—"An action will not lie for defamatory words spoken in the course of litigation, which are relevant to that litigation." But Williams, Crompton and Crowder, JJ., appear to found their judgments on the ground in which the judgment in *Kennedy v. Hilliard* was mainly rested; namely (in the words of Mr. Justice Crompton), "the great mischief that would result, if witnesses in Courts of Justice were not at liberty to speak freely, subject only to the animadversions of the Court;" and this he treats as the "origin of the rule," that "in this country no such action lies."

E. T. 1869. accordingly that, admitting the principle, this case does not
Eschequer. within that principle. This, certainly, is a very serious question
 KENNEDY and if I considered the matter now to be open to us, I should
 HILLIARD. be very slow to take upon myself, with confidence, to decide the
 question in favour of the defendant, but I consider that the question
 is closed by authority. During the argument, I recollected the case
 of *Gildea v. Brien*, referred to by my LORD CHIEF BARON, which
 I had heard argued in the Court of Common Pleas; for, although I was
 not actually Counsel in the case, I had been Counsel for one of the
 parties in the Chancery suit out of which that action arose, and
 I therefore paid a good deal of attention to the argument; and the
 case was unquestionably decided on the grounds that the affidavit
 was made in a judicial proceeding; and the circumstance of the
 statement having been expunged by the Court of Chancery does
 not appear to have made any difference. I, therefore, consider that
 the present case ruled by that authority, and upon that ground I
 think that judgment should be given for the defendant.

GREENE, B.

This was a demurrer to a rejoinder. The action was for libel.
 To the third paragraph the defence was, that the alleged libellous
 matter was part of an affidavit made by the defendant in a certain
 cause petition in the Court of Chancery, upon the taxation of
 certain costs, in reply to one made by the plaintiff in the course of
 the same taxation, and which contained certain imputations upon
 the defendant. To this defence the plaintiff replied, admitting that
 such were the facts, but stating that an order had been made by the
 Court of Chancery, referring the defendant's affidavit for prolixity,
 impertinence and scandal, and that, in pursuance of that order,
 the passages in the affidavit, on which the action is brought, were
 expunged. The defendant has rejoined that the plaintiff having
 filed objections to the defendant's affidavit, for impertinence and
 scandal, in respect of the passages objected to as libellous, and
 the Taxing-master having, in consequence, stayed the taxation,
 the defendant himself obtained the order for the sole purpose of
 expediting the taxation of the costs, and not because the objections

or any of them, were believed by him to be tenable, but, on the contrary, having been advised that they were untenable.

E. T. 1859.
Exchequer.
KENNEDY
v.
HILLIARD.

The first question is, whether the rejoinder furnishes a good answer to the replication? I am of opinion that it does not, because it appears to me that the effect of the order of reference and of the expunging, be that effect what it may, cannot be altered or affected by the consideration at whose instance or upon whose motion the thing was done. Its efficacy, as a judicial act or proceeding, cannot, in my opinion, be varied by that circumstance.

The defendant, however, falls back upon the replication, and insists that the privilege relied upon in his defence, namely, that he is not responsible in an action for a libel, for matter *bona fide* sworn by him in an affidavit made in the course of legal proceedings, has not been taken away or affected, by reason of the order or act of the Court of Chancery, expunging the objectionable passages. He contends that, although those passages do not now constitute a portion of the affidavit of record in the Court of Chancery, yet, as they once formed part of it, and were then privileged, that privilege has not been destroyed by the subsequent removal of them from the affidavit.

To this the plaintiff's Counsel answer, first, that even if the matters complained of had been privileged in the interval between the filing of the affidavit and the expunging, yet, after the order and the expunging authorised by it, the privilege no longer existed, and of course did not exist when the action was brought; and, secondly, that, at all events, the defence pleaded is no legal bar to the action.

We are to consider, then, whether the defence itself is good; that is, whether the facts there detailed furnish a good answer to the action. If they do not, it is unnecessary to discuss the merits of the replication, because the plaintiff is entitled to judgment upon the whole record. If they do, then we must consider whether the *prima facie* defence, thus established, is defeated by the facts alleged in the replication.

It cannot be disputed, as a general rule, that anything said, or published in writing, in the course and as part of legal proceedings

E. T. 1859. cannot be made the subject of an action for defamation or libel. *Eschequer.* One point discussed in the present case was, whether this rule is universal and unqualified, or whether it is subject to any, and, if so, to what modification or exception. Lord Mansfield is reported in the case of *Res v. Skinner* (a), to have said, "Neither party, nor the Bench, Counsel, jury, or Judges, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the Court will take notice of them as a contempt, and examine on information. If anything *malum* is found on such inquiry, it will be punished suitably." Lord Mansfield, if this be correctly reported, considered that the protection is without limitation; and that the appropriate and only remedy, even for words opprobrious and irrelevant, is to be administered by the Court itself in which they were used. The same authority appears to have taken a similar view of the law in the case of *Astley v. Young* (b), where he uses this language:—"There can be no scandal, if the allegation be material; and if it is not, the Court before whom the indignity is committed by immaterial scandal may order satisfaction, and expunge it out of the record, if it be upon record." Here, again, Lord Mansfield holds that even in cases of scandalous and irrelevant language it is for the Court to afford redress; and, accordingly, it was there held that an action for libel could not be sustained against a person who, in answer to an affidavit made by the plaintiff, with reference to an application to Magistrates for a licence, made an affidavit, in which he swore that the plaintiff's affidavit was false. So in *1 Roll. Ab. p. 87, pl. 4*, an affidavit having been made in order to compel the defendant to give sureties for his good behaviour, the defendant said, "There is not a word of truth in that affidavit, and I will prove it by forty witnesses," it was held that no action of slander lay for the use of those words. Again, in *Sir Anthony Barker's Case*, in the Star Chamber (c), where a plaintiff charged the defendant with the forgery of a will, which charge he afterwards abandoned, the Court awarded damages to the defendant, assigning as a reason, that

(a) Lloft, 55.

(b) 2 Burr. 811.

(c) Moore, 820.

ough the bill was found slanderous, no action on the case lay at the Common Law, because the bill had been preferred to a Judge incompetent to punish the offence, had any been committed. So in *Stanley v. Curson*, cited *Cro. Eliz.*, p. 230, one was brought in by *subpoena ad testificandum*, and upon his oath declared matter of infamy against the plaintiff, yet he coming in by course of justice, and if he swear falsely he may be punished for perjury, an action did not lie. The same doctrine, in the case of a witness, was laid down in the case of *Harding v. Bodman* (a), as also in *Weston v. Jobniet* (b), and *Ayres v. Sedgwick* (c). In *Cutler v. Dixon* (d) it was adjudged that if one exhibits articles of the peace against a person, charging great abuses and misdemeanours, to the intent that he party should be bound to her good behaviour, the party accused shall not have any action on the case, for they have pursued the ordinary course of justice in such case. The same ruling was made in *Beauchamps v. Croft* (e). In 2 *Inst.*, p. 228, it is said:—"If any man bring an appeal of murder, robbery, &c., against a peer, no action of *sean. mag.* will lie for the bringing of the action, nor for affirming the same to his Counsel, attorney, or cursiter, for the framing of his writ, or for speaking the same in evidence to a jury, or for using of those words for the necessary commencement or prosecution of his action judicially." And the same law in *Arundell v. Tregeno* (f), and *Ansfield v. Feverhill* (g).

The cases to which I have hitherto referred were those of parties or witnesses stating, in the course of the administration of justice, matters slanderous and libellous. With respect to this class of cases, the privilege appears to have been recognised as universal and without qualification or exception. Indeed the reason assigned for the existence of the rule implies the reasonableness of its universality, namely, that suitors or witnesses are not to be deterred by the fear of actions from prosecuting claims or giving testimony in proceedings at law.

E. T. 1859.
Exchequer.
 KENNEDY
 v.
 HILLIARD.

(a) Hutt. 11.

(b) Cro. Jac. 432.

(c) Palm. 142.

(d) 4 Rep. 14 b.

(e) 3 Dyer, 285 a.

(f) Yelv. 116.

(g) 2 Bulst. 289.

E. T. 1859. To the cases already mentioned may be added those of *Malone*
Exchequer. *Bartley* (a), and *Trotman v. Dunn* (b), referred to by my L.
 KENNEDY CHIEF BARON. It is true that in the report of *Ayres v. Se*
 v. *wick* (c), one of the Judges takes the distinction that if one u
 slanderous words on his oath, *which are not to the issue, or the p*
to which he ought to give evidence, an action lies; and it w
 appear from the case of *Revis v. Smith* (d), that the Counsel for
 defendant conceived that relevancy was an ingredient in the
 lishment of the privilege, for he relies (p. 131) on the fact t
 there the swearing was relevant. So in p. 136. These are
 only instances of parties or witnesses in which I have found re
 vancy alluded to.

I shall now advert to a distinct class of cases, namely, those
 relating to the privilege of Counsel in the language used by them
 the discharge of their duty in a cause. A leading case on this s
 ject is *Brook v. Montague* (e), where in an action for slander, in say
 that the plaintiff had been arraigned and convicted of felony, the
 defendant justified, that the defendant being a Counsellor-at-law sp
 the words at a trial as Counsel for one of the parties; and the Co
 resolved that the justification was good, and that the defendant h
 a right to enforce anything informed him by his client, "*it being p*
 "*tinent to the matter in issue. But matter not pertinent to the iss*
 "or the matter in question, he need not to deliver, for he is to deli
 "in his discretion what he is to deliver, and what not; and altho
 "it be false he is excusable, *being pertinent to the matter*; but if
 "give in evidence anything not material to the issue, *which is no*
 "*dalous*, he ought to aver it to be true, otherwise he is punishable.
 Here the relevancy and pertinency of the words appears to be co
 sidered essential in order to establish the privilege. So in *Hodge*
v. Scarlett (f), relevancy is treated throughout as a necessary co
 dition, in order to justify the use of scandalous words. It appea
 from p. 236, that the Court called for a report of the case i
 which the words had been used, for the very purpose of enabling

(a) 3 Camp. 210.

(c) Palm. 145.

(e) Cro. Jac. 80.

(b) 4 Camp. 211.

(d) 18 C. B. 126.

(f) 1 B. & Ald. 222.

them to form a judgment as to their pertinency to the matter there in issue ; and both Lord Ellenborough and Bayley, J., in their judgments expressly rely on the ground that the words were relevant ; so also does Abbott, J. Mr. J. Holroyd also, although not so directly, does, I think, consider the relevancy of the words to be material.

E. T. 1859.
Eschequer.
 KENNEDY
 v.
 HILLIARD.

As I understood the argument of the plaintiff's Counsel in the present case, it was this ; that this qualification, which, as it would appear, exists in the case of words spoken by a Counsel on behalf of his client, viz., that the matter must be pertinent, is not confined to that species of privilege, but must be considered as universally applicable to the rule which protects words spoken or written in the course of a judicial inquiry ; that the plea does not aver that the passages in the affidavit, which are the subject of the action, were pertinent or relevant, and that the Court, in the absence of such averment, ought to form its own conclusion upon that point, which conclusion ought to be, that those passages were irrelevant and impertinent, as well as scandalous.

Now assuming the inquiry as to relevancy to be open and material, in the case of language used by a Counsel, as in *Brook v. Montague*, and *Hodgson v. Scarlett*, I cannot find any satisfactory authority for the position that it is so in the case of a party to a proceeding, or a witness. Considering the foundation of the rule, which is, that public policy requires that a man shall not be deterred by the fear of an action from instituting a legal proceeding, or giving full and free testimony for the advancement of justice, I do not see how the protection intended to be afforded to such a person can have its full and effectual operation, if he is, at his peril, to see to the relevancy and pertinence of his statement. A Counsel, being *legis peritus*, and retained for a client, and being at liberty to exercise his own discretion, may possibly be differently circumstanced. It may not be unreasonable to expect from him a greater degree of circumspection. Be that as it may, however, it is enough to say that the present is the case not of a Counsel, but of a witness, and indeed, it may be said, of a party acting in his own defence. Assuming, however, that the question of relevancy was material,

E. T. 1859.
Eschequer.
 KENNEDY
 v.
 HILLIARD.

upon whom would the onus lie of raising that question? Upon the defendant, who relies upon the general rule, or upon the plaintiff who seeks to engraft upon it a qualification? I should be disposed to say that it would be on the plaintiff. It is not to be presumed that what is contained in an affidavit made in the course of a judicial inquiry is impertinent or irrelevant; the presumption should rather be the other way. If so, it is not for the defendant to raise materiality, but for the plaintiff to allege irrelevancy. As to the Court deciding the question of relevancy, on the pleadings before them, I do not see how they could do so. It might depend upon some merits in the original cause, which these pleadings do not disclose. It is, I apprehend, a question of fact, or of law mixed with fact, and to be submitted to a jury, upon a distinct issue.

The result of what I have hitherto said is that, in my opinion, the defence is valid, and furnishes a good answer to the plaintiff. This renders it necessary to examine whether the replication contains a sufficient answer to the defence. I am not aware of any case in point in this respect. We must, therefore, consider the matter upon general principles, and upon the effect of such an order as that made in the replication, in depriving a party situated like the defendant of the protection which otherwise he would have a right to claim. The question involved in the replication is this, whether, after a party or witness in a proceeding in Equity has made an affidavit which is filed in the Court, and contains scandalous matter, to which no action could be maintained, he is deprived of his right to justify the making of such an affidavit, by reason of the Court's order which it has been made having directed that the scandalous matter should be expunged, and of its having been expunged accordingly? The case of the plaintiff, as I understand it, is put in two ways: first, that the effect of the expunging is that the parts expunged are to be considered as not having been contained in the affidavit at all; and, secondly, as an adjudication that those parts are irrelevant and scandalous, and consequently not falling within the rule of protection. As to the first of these views, it appears to me to be a strange course to treat the passages in question as existing portions of the affidavit, for the purposes of an action, and to treat them as not being so with reference to the defence to that action. My impression is

that the effect of the order is, that after the order the passages shall *no longer form* part of the record; but that, on the one hand, any right of action which existed whilst they *were* part of the record, or any defence to such action, on the other hand, is not divested by the order, which ought not to have this sort of *ab initio* operation, sweeping away such passages as if they had never been.

E. T. 1859.
Eschequer.
 KENNEDY
 v.
 HILLIARD.

As to the effect of the order as an adjudication, I do not find any authority which goes the length of saying that such an expression of opinion by the Court which makes the order precludes a party sued at Law from defending himself, by saying that there is no actionable scandal. The Court, in order to preserve the purity of its records, will expunge scandalous matters, *if irrelevant*, but *not otherwise*. The order, if a *judicial decision* of anything, is, that the matter *is* irrelevant; but is the *party* who introduces it to be, on that account, estopped from defending himself in a Court of Law, in an action for a libel, on the ground of privilege?

In an *Anonymous case* (a), the Vice-Chancellor refused an application made by a person who was not a party in the cause, to refer a bill for scandal, on the ground that the party did not need the interference of the Court, as he had his action at Law. But I do not consider this as an authority that such an action would lie. Indirectly it may be said that the effect of the decision is, that the expunging of the scandal would be a *satisfaction* or a *substitution* for an action; but I do not understand that the Vice-Chancellor intended to convey that meaning. So, in *Williams v. Douglas* (b), it was held that a stranger to the cause could not refer a bill for scandal, at least without special leave; but the Master of the Rolls does not in that case say that the stranger might maintain an *action*.

In *Hodgson v. Scarlett* (c), Mr. Justice Holroyd threw out that, if the words were not spoken *bona fide*, or express malice were shown, a special action on the case, although not the ordinary action for slander, might be maintainable. He does not, however, so decide; and I am not aware that any such action has been successfully prosecuted. A similar notion appears to have existed

(a) 4 Mad. 252.

(c) 1 B. & Ald. 247.

(b) 5 Beav. 82.

E. T. 1859. in the mind of the same learned Judge, in the case of *Fin
Eschequer.
KENNEDY
v.
HILLIARD.* *Pike* (a), in which last case he is reported to have said that malice and want of probable cause were alleged and proved. If an action on the case might lie; and, with reference to the action of slander, he seems then to have been of opinion that, even if slanderous language *not relevant* is used by Counsel, the action of slander would not lie. If this be a correct statement of Mr. Justice Holroyd's views, it would appear that, even in the case of Counsel, irrelevancy would not oust the privilege in an action of slander, any more than it would in the instance of a party or a witness.

Upon the whole of this case, I think that, upon the present record, the defendant is entitled to the judgment of the Court.

FITZGERALD, B.

I concur in the judgment of the Court. But, as I am unable to concur in several of the reasons of my LORD CHIEF BARON and my Brother GREENE, I shall say a few words, simply for the purpose of showing how far I see my own way in this case, on principle, and to what extent I think myself coerced by authority. We are all agreed that the material question is the sufficiency of the plaintiff's replication; and that replication relies on an order of the Court of Chancery expunging the libellous passage in the affidavit as being *pro* *impertinent* and scandalous. This order was relied upon by the plaintiff in two views; first, as an adjudication by the most competent Court (the Court in which the proceedings took place) that the matter was irrelevant; and further, as an adjudication that the libellous matter ought never to have formed part of a judicial proceeding in which it was made; and, therefore, it was contended that that order took from it *ab initio* all privilege. I agree with my LORD CHIEF BARON and my Brother GREENE that the defence is *prima facie* sufficient; and therefore the material question is that raised by the replication. The position of the defendant is, that an action for defamation cannot be maintained upon a statement made by a party in a judicial proceeding, for the pur-

(a) 1 B. & C. 473.

poses of that judicial proceeding. I agree that a statement made in the course of judicial proceeding and for the purposes of that proceeding is, although defamatory, *prima facie* privileged; and, therefore, I hold that the defence is sufficient: but the plaintiff's position is, that to support this privilege the statement must also be relevant to matter in issue in that judicial proceeding. I think it clearly established that its being made in a judicial proceeding will protect it, provided it be made in a course of justice, or, as it is sometimes called, in *due* course of judicial proceeding; but I think a statement may be made ostensibly for the purpose of a judicial proceeding, and yet not be made in a course of justice. I apprehend the test whether it is or not is, whether the truth or falsehood of it be examinable in the judicial proceeding in the course of which it is made. I am of opinion that the truth or falsehood of statements irrelevant to the issues in a judicial proceeding is not examinable in the proceeding in which the statements are made; and, therefore, if not coerced by authority, I should be disposed to hold that the relevancy or irrelevancy of the statement was a material question, and that if the statement be irrelevant it is not made in a course of justice, and, therefore, is not privileged. I shall only observe, upon the authorities cited, that upon the best consideration which I have been able to give to the case of *Buckley v. Wood*, in *Coke's Rep.*, I do not agree with the criticisms upon it; but I do not think it necessary to enter into a discussion of that case, because it appears to me perfectly plain that, in the case referred to by my LORD CHIEF BARON—I mean *Gildea v. Brien*—both points relied on by the plaintiff must have been disposed of against his contention. That case could not have been disposed of as it was, without the Court holding that the relevancy of the matter in the affidavit, and the subsequent expunging of it, were immaterial. The matter is made still more satisfactory by my Brother RICHARDS' recollection that those grounds were relied on. It appears to me, therefore, that this case is closed by authority.

E. T. 1859.
Exchequer.
 KENNEDY
 v.
 HILLIARD.

H. T. 1821.
Common Pleas.

JOHN GILDEA v. LOWTHER BRIEN.

[Hilary Term, 2 G. 4, 1821.]

(*Common Pleas*).

THE facts of this case, as they appear on the record of the judgment, were these:—The declaration, which was in libel, contained three counts; and the first count stated that Lowther Brien, the defendant, “Did wickedly and maliciously make and exhibit and publish a certain cause to be made, exhibited and published, to the High Court of Chancery, a certain false, scandalous, malicious and defamatory libel, contained in a certain affidavit in writing, of and concerning him the said John Gildea, according to the following tenor:—” is to say, that the said John Gildea (meaning the plaintiff) “is a person of notorious and infamous character, and not deserving credit on his (meaning the plaintiff’s) oath in a Court of Justice; as this deponent (meaning the defendant) is convinced and believes; and deponent (meaning the defendant) saith that this deponent’s (meaning his the said Lowther Brien’s) own knowledge, and in this defendant’s (meaning his said Lowther Brien’s) presence, the said John Gildea (meaning the plaintiff) was disbelieved, on his most positive swearing before a Judge and jury at an Assizes in the county of Tyrone; and this deponent (meaning the said Lowther Brien) saith that the said John Gildea (meaning the said plaintiff) hath no fixed place of residence, but is a common vagrant, and, for the most part, keeps himself (meaning the plaintiff) secreted and concealed in distant and remote parts of the counties of Tyrone, Donegal and Fermanagh, and seldom, if ever, appears in public, except when armed with offensive weapons.”

The other counts of the declaration merely varied the statement in the first.

Pleas.—First; not guilty.

Second.—To the second, sixth and tenth counts, and to parts of the first, fifth and ninth, justification, by alleging the truth of the imputed libel.

Third.—To the third, seventh and eleventh counts, and to part of first, fifth and ninth, like plea. H. T. 1821.
Common Pleas.

Fourth.—To the fourth, eighth and twelfth counts, and part of first, fifth and ninth, like plea. GILDEA
v.
BRIEN.

Fifth, as to all the counts.—That the several supposed affidavits and writings in the several counts mentioned are one and the same affidavit and writing. That before the exhibiting, making or publishing of said affidavit, to wit, on the 20th of September 1819, a certain cause or suit was, and still is, depending in the Court of Chancery, in which one John Brien was plaintiff, and the said Lowther Brien was defendant. That the said John Gildea made an affidavit in that cause, which was filed; that such affidavit of John Gildea was sworn and filed for the purpose of grounding a motion for an attachment against the said Lowther Brien, intended to be made by the said John Brien, the plaintiff in the Chancery cause; which motion, grounded, among other things, on said affidavit of John Gildea, the said John Brien, on the 18th of October 1819, caused a notice to be served on the said Lowther, according to the practice of the Court of Chancery. That the said affidavit of the said John Gildea, among other things, contains the words following:—

And this deponent further saith that he did, on a former occasion, give testimony in a cause or proceeding, in which the said defendant did take, as the deponent believes, a very great interest, and in which he was also a party; and saith that in such case the deponent was further examined, very near two years ago, as a witness, and did prove, as this deponent believes, and now best recollects, certain facts and matters which were in opposition to the case, that the said Lowther Brien was desirous should be established, as this deponent verily believes; and saith such testimony of this deponent has never been impeached or impugned, as the deponent believes; and the deponent positively saith that he was perfectly uninterested in the matters in issue in said Court, and deposed to nothing therein, or any other occasion, in which this deponent was examined as a witness, that was not, to the best of this deponent's judgment and belief, most accurately and conscientiously true; and he the deponent saith that the imputation

H. T. 1821. "thrown out by the said Lowther Brien against this depo-
Common Pleas. "aforesaid is totally false and without the slightest foundation."

GILDEA
 v.

BRIEN.

That, in order to oppose the said motion for an attachment pending as aforesaid, it became and was material for the said Lowther to make and exhibit an affidavit in the said cause in the Court of Chancery, in answer to the said affidavit of the said John Gildea, and, for that purpose, therein to insert the words in the said accounts of the said declaration complained of. That afterwards, on the 5th of November 1819, the said Lowther did make, exhibit and publish in the said cause, and in the said Court of Chancery, such affidavit in writing as aforesaid, in answer to the said affidavit of the said John Gildea, and for the purpose of opposing the said motion for an attachment so pending against him as aforesaid; and he the said Lowther did cause and procure the said affidavit to be filed of record in said Court of Chancery, for the purpose aforesaid; and which last mentioned affidavit of the said Lowther is the same affidavit and writing in all the said accounts of the said declaration mentioned; and which making, exhibiting and publishing whereof is the same making, exhibiting and publishing of the said several supposed affidavits and writings, of which the said John Gildea has above, in all the said several counts of his said declaration, complained against him the said Lowther: this, &c.

The sixth plea, like the fifth, stated the filing of the affidavit of the said John Gildea, to support the intended motion for an attachment against the said Lowther, in the fifth plea; but not setting forth the contents of the affidavit, and stated that, "After the service of the said notice of the said motion, and for the purpose of opposing the said motion, and of preventing him the said Lowther from being attached by the said order of the said Court of Chancery, and in answer to the said affidavit of the said John Gildea, and not otherwise," on the 5th of November 1819, the said Lowther did make, exhibit and publish in said cause and in said Court of Chancery, an affidavit in writing, and afterwards caused and procured the said affidavit to be filed of record in said Court of Chancery, to be then and there used upon said motion, so pending as aforesaid: "And which said af-

avit, and the words therein, and in the said several counts of the said declaration complained of, was and were then and there material for the defence of the said Lowther Brien upon the said motion ;” which said affidavit is the same affidavit and writing all the said counts of the said declaration mentioned, and which in making, exhibiting and publishing thereof is the same, &c.

H. T. 1821.
Common Pleas.
GILDEA
v.
BRIEN.

Seventh plea, as to all the counts of the declaration, same as the sixth, but stated the writing of the affidavit complained of thus :— And the said Lowther further says that, after service of the said notice of the said motion, and for the purpose of opposing the said motion, and of preventing him the said Lowther from being attached, and in answer to the said affidavit of the said John Gildea, and not otherwise, on the 5th of November 1819 the said Lowther did make and file in the said cause, and in said Court of Chancery, an affidavit in writing, and did after, on the 5th of November 1819, &c., cause and procure the said last mentioned affidavit to be filed as of record in said Court of Chancery, for the purpose of being then and there used upon the said motion, so pending as aforesaid, for the purposes aforesaid.” The other pleadings it is unnecessary to state.

At the trial, proof was given of the pendency of the cause in Chancery ; and the affidavit complained of was produced, showing the passages complained of erased ; and proof was given that those passages were in the affidavit in its original state. A witness proved that, in pursuance of his duty, and on the usual reference, he attended before the Master in Chancery, who drew lines across those passages in the affidavit as produced. The notice of motion on which the affidavit was stated to have been used was also given in evidence.

The affidavit was then offered to be read as it was, in its original state. It was objected to by the defendant’s Counsel ; but the Judge decided that the affidavit itself being produced, the same should be read throughout, in order that the jury should be at liberty to have inspection of the same, so as to be informed of the facts expunged, on the said reference to the Master, by the parties in the cause, and that they might judge whether the affidavit alleged in

H. T. 1921. the pleadings was proved, as contained in the declaration
Common Pleas ruling the defendant's Counsel excepted.

GILDERA
 v.
 MURKIN.

The defendant's Counsel then spoke to the case, defence, which consisted chiefly of the proceedings in the case, including the affidavit of the plaintiff, John C. 1st of September 1819; the notice of the motion for against Lowther Brien, and motion thereon, and an attachment absolute against the defendant.

Evidence was then given in support of the plea founded on the alleged truth of the facts stated in the evidence for the plaintiff had closed, Counsel for the defendant insisted that the affidavit of defendant, inasmuch as it proceeded in a Court of Justice, should not be permitted and further, that the part erased by the Master should go to the jury; and that, although the Judge should rule that the part erased should go to the jury, there was no evidence in the plaintiff's case: but the Judge was of opinion that the affidavit, thus proved, was evidence to go to the jury, at liberty to consider whether the same was *bona fide* filed, with a view of obtaining redress or making a defence, whether it was filed with a malicious intention or designed to impeach the defendant's character, under colour of a legal proceeding, on the occasion of filing the same and the contents of said affidavit as sworn, to have been originally on the file without erasure: they believed the same to have been so sworn and filed without having any erasure thereon: and the Counsel for the defendant then and there insisted before the said learned Judge, inasmuch as the part of the said affidavit alleged to be erased appeared upon the production of the said affidavit to be erased and struck out, he ought not to allow the said part of the affidavit, so cancelled and struck out, to be read and given in evidence to the said jury: but the learned Judge was then and there pleased to declare himself of a different opinion: and he did there permit the part of the said affidavit so struck out and cancelled to be read and given in evidence to said jury; to which opinion of the said learned Judge, Counsel for the defendant then and there

H. T. 1821.

Common Pleas.

GILDEA

v.

BRIEN.

ed; and Counsel for the defendant insisted before the said Judge, that he should charge the jury that, if they believed said affidavit of the said defendant had been sworn and made by him in answer to the said affidavit of the said plaintiff, to defend himself against said motion for an attachment, in which case they were bound to find a verdict for the defendant; but the said learned Judge was pleased to declare himself of a different opinion, and to charge the jury that, although they believed that the said affidavit was sworn for the purpose of making use of upon the said motion, yet they might find a verdict for the plaintiff: and the Counsel for the defendant then and there insisted that the said learned Judge should charge the jury that the evidence so given by the defendant as aforesaid, if the jury believed the same, sustained the fifth and sixth pleas in bar of the said defendant to the plaintiff's declaration; but the said learned Judge refused so to charge the said jury, but, on the contrary, charged them that, although they might believe the matters so given in evidence on the part of the said defendant, yet they might find a verdict for the plaintiff; and to which refusal and opinion of the said learned Judge the Counsel for the said defendant then and there excepted; and the Counsel for the said defendant then and there insisted, that the said learned Judge should charge the jury that the evidence so given by the defendant as aforesaid, if the jury believed the same, sustained the seventh plea in bar of the said defendant to the plaintiff's declaration; but the said learned Judge refused so to charge the said jury; but on the contrary, charged them that although they might believe the said several matters, so given in evidence on the part of the said defendant, yet they might find a verdict for the plaintiff: and to which refusal and opinion of the said learned Judge the Counsel for the said defendant then excepted.

Counsel for the defendant then insisted upon the following issues, amongst others, being sent to the jury:—Whether the affidavit in the fifth and sixth plea mentioned was material and necessary for the defendant's defence against the motion for attachment, in said plea mentioned? and whether the defendant made the affidavit in

H. T. 1821.
Common Pleas.

GILDEA
v.
BRIEN.

his seventh plea mentioned, for the purpose of opposing the notice in the said plea mentioned, and of preventing him the said defendant from being attached, and in answer to the affidavit of plaintiff and not otherwise? which the Judge, accordingly, on being addressed by the defendant's Counsel, agreed that they should be given to the jury as tendered and drawn up by said Counsel; and the jury thereupon found for the said plaintiff, with forty shilling damages, and sixpence costs; and further, at the request of the Court, declared they also found for the plaintiff on all the foregoing issues.

The roll then contained the following entry:—"And hereupon all and singular the premises being viewed, and by the Court here fully understood, and mature deliberation being thereupon had, it is considered by the said Justices, that the said John Gildea take nothing by his said bill; but that he in mercy and soforth for his false claim; and it is further considered that the said Lowther Brien do recover against the said John Gildea, the sum of £—, for his expenses and costs in and about his defence in this behalf sustained, adjudged to the said Lowther Brien at his request, according to the form of the statute and soforth; and that the said Lowther Brien have execution in the same, and soforth.—Judgment, 1st of March 1823, pursuant to the order of 19th of November 1822."

DOWLING v. DOWLING.

(*Exchequer.*)

H. T. 1860.
Jan. 20, 21.

In an action for money lent, evidence of the poverty of the alleged lender is admissible upon the issue whether or not the money was lent.

THIS was an action for money lent. The defence was a denial of the alleged loan. At the trial, before FROST, C. B., at the Sitting after Trinity Term 1859, the defendant, in support of his allegation that no money was lent, tendered evidence as to the pecuniary cir-

circumstances of the plaintiff; and proved, by the evidence of the defendant and another witness, that the plaintiff was a person of no property of his own, and that he took no benefit under his father's will; that he had been a labourer at one shilling a-day, and that his means of livelihood were very precarious. This evidence was pointed to a period which was seven years anterior to the alleged loan, and to isolated periods from that date down to the transaction in question. All this evidence was objected to by the defendant's Counsel. The jury found a verdict for the defendant.

H. T. 1860.
Eschequer.
 DOWLING
 v.
 DOWLING.

In Michaelmas Term, a conditional order having been obtained on the part of the plaintiff, to set aside the verdict, and for a new trial, on the ground of the reception of illegal evidence—

C. Rolleston (with him *W. J. Sidney*) showed cause.

The only issue between the parties was whether or not the money was lent. It will be contended that evidence of the circumstances of the alleged lender was not admissible upon that issue; but, if it were proved that, immediately before the alleged loan, the plaintiff was a pauper, would not a jury be justified in taking that circumstance, viz., the plaintiff's inability to lend, into their consideration, upon the question whether he lent or not? All the circumstances surrounding the transaction are evidence to go to the jury. This is one of those circumstances. Such evidence in practice is constantly tendered and received without objection. It is a collateral fact, capable of affording a reasonable presumption on the matter of fact the subject of dispute: *Alcock v. Royal Exchange Insurance Company* (a).

J. P. Hamilton and *W. P. Carr*, in support of the conditional order.

Upon the issue between the parties, we submit that it was not competent to give affirmative evidence of the circumstances of either plaintiff or defendant. The proof was not that the plaintiff was physically incapable, at the particular time, of lending the

(a) 13 Q. B. 292.

H. T. 1860.
Exchequer.
 DOWLING
 v.
 DOWLING.

money, but, by examining the history of his entire life, it was attempted to show that he was not a likely person to lend. It might as well be contended that, upon this issue, evidence could be given of the plaintiff's wealth, to show he had money to lend, or of the defendant's wealth, to show he was not in want of money. Here, evidence was given that seven years ago the plaintiff was labourer at one shilling a-day. Evidence of the circumstances of the plaintiff, at isolated periods of his life, is no proof that at a particular period he was incapable of lending £40. A witness cannot be contradicted except upon a point material to the issue to be tried. The principle enunciated in *Attorney-General v. Hitchcock* (a) applies, that the evidence is too remote from the issue, and too uncertain for a jury to found a verdict on: *Dowling v. Butcher* (b); *Hollingham v. Head* (c).

PIGOT, C. B., referred to *Rowe v. Polkinghorne* (d).

W. J. Sidney, in reply.

The test is whether the particular matter is fairly within the issue. Proof of the poverty of the plaintiff was a matter immediately connected with the subject of inquiry—the fact of the loan and his ability to make it: *Melluish v. Collier* (e). In Courts of Equity, upon a question whether property has been bought with the purchase-money of an agent or not, it was always allowable to prove that the circumstances of the alleged purchaser were so mean as to make the purchase by him impossible: *Wilkinson v. Stevens* (f); *Lewin on Trusts*, p. 205.

PIGOT, C. B.

I am very clearly of opinion that the objection to this verdict grounded on the admission of evidence of the plaintiff's poverty, leading to an inference of his inability to lend the money in question, cannot be sustained. I confess I was somewhat surprised at the question being made the subject of argument; and at the

(a) 1 Exch. 91.

(c) 4 C. B., N. S., 386.

(e) 15 Q. B. 878.

(b) 2 M. & Rob. 374.

(d) 1 Car. & K. 618.

(f) 1 Y. & G., C. C., 431.

assertion that the reception of such evidence was not sanctioned by authority. In my own experience, now of many years, it has been the constant practice of Judges to receive such evidence when offered, whether in a Court of Law or a Court of Equity, upon the question whether or not money was paid; especially where that question related to transactions of a remote period, to which it was difficult to apply other than circumstantial evidence. In such cases, proof that a party was in such circumstances that he *could not*, has been received as evidence that he *did not*, pay the money in question. The evidence has been usually applied in proceedings for the recovery of stale demands, or upon the trial of issues from Courts of Equity as to the fact of payment, or as to the subsistence, unsatisfied, of an old debt. A controversy of a similar kind arose some time ago in this Court, in *Norris v. Launder (a)*. The question there was, whether a judgment debt was paid? and in that case a very considerable portion of the evidence was applied to prove the insufficiency of the property of one of the parties liable to a debt, to discharge the demand. Evidence of this nature is plainly admissible; for the simple reason, that it constitutes, or forms part of, circumstantial evidence, from which the jury are entitled to form their judgment as to the fact of payment and as to the credibility of conflicting testimony. The admissibility or inadmissibility of the evidence cannot depend upon the form in which the question is presented by the parties to the Court. Here it arises in the form of an action for money lent. It is said that there is no authority applicable to such an action. Possibly not; and possibly the point is not reported to have been ever decided in such an action, because the objection was never made, or because the decision was so plain as not to be deemed worth reporting. But lending is only one form of passing money from hand to hand; and upon the question whether or not money was paid, evidence of the inability to pay, of the party who is alleged to have paid, is directly applicable to the question at issue, and is one of those circumstances surrounding the alleged transaction, and showing the relative positions of the parties, which, for determining the real

H. T. 1860.
Exchequer.
 DOWLING
 v.
 DOWLING.

(a) M. T. 1858, Nov. 27.

H. T. 1860.

Eschequer.

DOWLING

v.

DOWLING.

nature of their dealings with each other, are always proper for consideration of a jury. In favour of the reception of such evidence there are, besides the cases referred to in *Levin on Trusts*, p. 26, and *Wilkins v. Stevens* (a), mentioned at the close of the argument a multitude of authorities which were not cited at the Bar. The reported cases are chiefly those in which the question has arisen upon the presumption of payment, from lapse of time, and the rebutting of that presumption by evidence of the inability of the party or of the insufficiency of the property, liable to the demand. There is a learned note (written, I believe, by Serjeant Manning), appended to the case of *Sanders v. Meredith* (b), in which several cases are collected, some applying directly to this subject.

The Reporter cites one case from a manuscript note of his own *Blacket v. Wall*, in the Court of Common Pleas, at Durham *Durham Assizes* 1812. There the question was, whether the defendant, at the end of forty-eight years, was entitled to a presumption that a judgment debt had been paid? The plaintiff recovered the defendant's great poverty being proved; and Wood, B., who tried the case, refused a new trial. That was not an inference of law, but a question of fact for the jury, namely, whether they would give force to the evidence of poverty, or to the presumption of payment? and the poverty of the defendant was held to be a reason to rebut the presumption arising from length of time. In *Constable v. Somerset*, referred to in *Oswald v. Legh* (c), similar evidence was received. In *Fladong v. Winter* (d), evidence of this kind was received by the Master, and sanctioned by Lord Eldon, to rebut the presumption, after the lapse of more than twenty years, that two old bonds were paid. There, in the course of the argument, a case (and, I believe, elsewhere reported) of *Wynne v. Waring* was cited, and was referred to by Counsel at both sides, and by Lord Eldon in his judgment. In *Wynne v. Waring*, as stated in the argument in *Fladong v. Winter*, the obligor in an old bond was known to be distressed during all the latter period of his life, having no property but real estate covered with mortgages; and the Master of the

(a) 1 Y. & Col., C. C., 431.

(b) 3 Mann. & Ry. 118.

(c) 1 T. R. 270.

(d) 19 Ves. 196.

tolls, having directed an action, or an issue, upon these and other circumstances, the jury thought the presumption rebutted.* So in *Fladong v. Winter*, the evidence was, "as to the insolvency" of the intestate, "stating that he lived at different lodgings; and generally "that he never had the means of paying the debt." In a case of *Willaine v. Gorges* (a), before Lord Ellenborough, similar evidence was received. That was an issue out of Chancery, to try whether there was anything due on a judgment of Hilary Term 1769, to secure the payment of an annuity. The circumstances given in evidence to rebut the presumption of satisfaction from lapse of time were, that the person who was the grantor of the annuity, and defendant in the judgment, soon after 1769 left the country, from the deranged state of his affairs; that in 1776 he executed a deed at Calais, in which the grantee's name appeared as a creditor; that he revisited England at intervals, under different feigned names; that he died in London, under a feigned name, in 1797; and that, in the opinion of his most intimate friends, in the interval from 1776 to his death, he never had the means of satisfying the judgment in question. But there was no proof of any payment, or of any sort of acknowledgment, subsequently to the year 1776. All that evidence was received by Lord Ellenborough; though, under the circumstances, he did not think it sufficient to rebut the presumption arising from the length of time, and the absence of any payment or acknowledgment. But evidence more clearly applicable to prove the circumstances of the party cannot be conceived. I have already, in the course of the argument, referred to *Rowe v. Polkinghorne* (b). There, an action was brought against a mother, for millinery goods (consisting of dresses) supplied to her daughter on the occasion of her approaching

H. T. 1860.
Eschequer.
 DOWLING
 v.
 DOWLING.

(a) 1 Camp. 217.

(b) 1 Car. & Kir. 618.

* NOTE.—See *Grenfell v. Girdlestone* (2 Y. & Col. 682), where Alderson, B., said that in *Wynne v. Waring*, the evidence, he thought, amounted to demonstration. He also stated, that he would himself have come to a different conclusion from the Master in *Fladong v. Winter*; though he would have concurred with Lord Eldon in confirming the Master's report, on the ground of the parties refusing to try the fact at Law. Baron Alderson, therefore, considered the evidence, in both cases, not only admissible, but material.

H. T. 1860.

Eschequer.

DOWLING

v.

DOWLING.

marriage; and evidence of the pecuniary circumstances of the mother was received, with a view to the question whether the payments were supplied to the daughter "on the credit of her future husband and not on the credit of her mother." In *The Mayor of Harwich v. Horner* (a), Lord Mansfield mentions one of the modes of answering the presumption of payment, arising from length of time, in the following terms, "as by *showing the party not to be in circumstances to pay*." There is one other case to which I wish to refer, because I think it illustrates strongly the manner in which evidence of the circumstances of the party may be left to the consideration of a jury, and because of the great authority of the Judge by whom the case was tried. In *Bigg v. Roberts* (b), the action was one of covenant for the arrears of an annuity. The defendants (the executors of the grantor, whose name was Rundell) pleaded a release by time and accident; and to induce the jury to presume such a release they showed that the annuity was not paid for eleven years, and that the plaintiff had borrowed money of the grantor of the annuity (who was his uncle), and had regularly paid him interest, without setting off the annuity. That was answered by evidence of the circumstances, respectively, in which the plaintiff and his uncle stood; the plaintiff having large expectations from the uncle, who was a very old man, "of immense wealth," who "understood business well, was particularly cautious in pecuniary matters," and "was a man of strong temper, very capricious, and peremptory with his relatives." Upon these and other circumstances the case was left to the jury. Lord Tenderden said:—"The great topic used for the defence is the payment of interest by Mr. Bigg to Mr. Rundell without his setting off the annuity. That this was the fact is proved by Mr. Bigg's letters, and by the account; and you are therefore, to consider whether this convinces you that the annuity was released; and in doing so you must look at the situation of the parties." Lord Tenderden then called the attention of the jury to the circumstances in which the parties respectively stood. He said:—"They were not indifferent persons—they were uncle and nephew, the latter having a large family, and great expectations from the

(a) Cowp. 102.

(b) 3 Car. & P. 43.

former, and the annuity being not one for which money had been paid, but one which was a voluntary gift. The uncle is proved to be a man advanced in years, and very attentive to his pecuniary concerns; and we see, and indeed it is human nature, that as men go on accumulating wealth, they have an increased desire to grasp at and accumulate more. You will, therefore, say whether you think that the forbearance of the plaintiff to claim this annuity was on account of his having executed some deed of release which cannot be found, or whether you will attribute it to this,—that having great expectations from his uncle, and having, also, that due regard to his own interest, and that of his family, which every man ought to have, he chose regularly to pay the interest on his own bond, which his uncle exacted as a matter of business, and yet forbore to mention the annuity, as it might induce his displeasure, by lessening the sum that his uncle had to receive of him." The jury found for the plaintiff, damages £8850, thus negating the release. All those circumstances were consistent with a release having been executed; but they were also circumstances which were fairly left to the jury, as tending to show that no such release had been executed, because they were calculated to influence reasonable minds in determining the motives, and so inferring the acts, of the parties. When the question directly in controversy is, whether in point of fact money was paid, it would seem, *prima facie*, that stronger evidence could hardly be given to show that the fact did not take place, than proof that the fact was impossible; that the party did not pay money, because he had it not to pay.

It is said that this will open a wide issue for a jury, as to time. Unquestionably it will; but it must be left to the discretion of the Judge to take care that the evidence shall be confined within reasonable bounds. Instances might be put in which it would be mere folly to give the slightest weight to such evidence, or, indeed, to admit it at all. Suppose a gentleman, enjoying large and lucrative practice for many years at the Bar, had, in early life, earned his bread in a comparatively humble position; and suppose that thirty years afterwards, after long and successful practice, he lends a sum

H. T. 1860.

Eschequer.

DOWLING

v.

DOWLING.

H. T. 1860.
Eschequer.
 DOWLING
 v.
 DOWLING.

of £10,000, who would think of inquiring into the early history of the poverty or the difficulties of his younger years? So in the case of a merchant in extensive trade; no one would think it material to prove that thirty years ago he acted as a porter, in order to test his ability to pay a debt, or make a loan, a year before that. Here the evidence that was offered went back a distance of many years; but the object of showing the plaintiff's circumstances, many years before, was to prove the position in life out of which he had emerged, and to show, partly by his own statements, on his cross-examination, of his own intervening pursuits, and partly by the evidence of the defendant, that he had not acquired property in the interval; and that at the time when the loan was alleged to have been made he had not the means of making it. It is said that evidence of this kind will be a surprise upon parties; and so it sometimes may be. So may be evidence of conversations and admissions undisclosed by the pleadings, or by any previous notice; yet proof of these cannot be rejected. Perhaps it may be truly said that such proof of conversations and admissions is given in a large portion of the cases tried at Nisi Prius. Few cases can be imagined in which a party may not be surprised by unexpected evidence produced by his adversary. But every trial is open to revision, and that can be done to redress that mischief, when it presses unjustly, is that the Court shall direct a re-investigation, if a proper case can be shown. The circumstances of the parties, and the positions which they stood when the matter the subject of controversy occurred, are, for the most part, proper subjects of evidence to be submitted to a jury; and the recent changes in the law, by which parties are enabled to swear for themselves, have rendered evidence of "surrounding circumstances" still more important than it was before. They often supply the only means of determining upon testimony at one side directly conflicting with the testimony of the other; and such was the testimony in the case now before the Court. There would be little safety against unfounded demands, supported by reckless swearing, if circumstances of this kind, not too remote from the facts, could not be submitted to the judgment and common sense of a jury. For these reasons, I am of opinion that the evidence was properly

received, and that the verdict cannot be disturbed. I should not have thought it worth while to state those reasons so much at large, but for the earnestness with which the argument was pressed, and the very slight reference to authority which was made in the course of the discussion at the Bar.*

H. T. 1860.

Exchequer.

DOWLING

v.

DOWLING.

* NOTE.—In addition to the cases referred to in *Lewin on Trusts*, p. 205, cited in the argument (*Willis v. Willis*, 2 Atk. p. 71, *Lench v. Lench*, 10 Ves. p. 518), *Ryal v. Ryal*, as it is reported in 1 *Ambler*, p. 412, may be cited as an authority to the same effect. There, upon the question whether the assets of a deceased person could be followed into lands purchased by his executor, on the grounds that they were bought with those assets, "Proof was that Jonathan Ryal," the executor, "after the testator's death purchased several estates; and that before that time he was a poor person, and not able to pay for them out of his own money." In *Coles v. Emerson* (Rep. in Chan., p. 42), a bill was brought in the 10 Car. 1 (must have been 1634), to be relieved against a bond "of 1612, in £60, to pay £30 at nine days' end, and never sued till now, although defendant always necessitous, and a prisoner, and the plaintiff a man of worth. This Court conceived the said money to be satisfied, it not being demanded in twenty-two years, and decreed the bond to be delivered up to be cancelled."

NEWENHAM v. SMITH.

T. T. 1859.

May 9, 10,
June 11.

THIS was an action for money had and received, brought to try the right to the office of sexton in St. Andrew's parish, in the city of Dublin. The case was tried before the LORD CHIEF BARON, at the Sittings after Hilary Term 1859, when, upon the findings of the jury on the questions submitted to them, his Lordship directed

N., a candidate for the office of sexton in a parish church, solicited the appointment from B., who had the sole right of nomination. B.

wrote and delivered to him the following document:—"Dublin, 12th of July 1858.—This is to certify that I approve of J. N. being appointed to the situation of sexton to the parish of St. A., vacant by the resignation of T. O'C.—To all whom it may concern.—W. B., Vicar."

Held.—That this document amounted to an actual present appointment of N.

Held also, that the parol evidence of B. was inadmissible to explain the document, and show that it referred to a future appointment.

Sembla.—The circumstances (if any there were) attending the delivery of the document to N. by B. might be submitted to the jury as evidence from which they might infer that the document was an escrow, or conditional appointment.

T. T. 1859. a verdict to be entered for the plaintiff, but reserved liberty to
Eschequer. defendant to move, in certain events, to have a verdict entered
 HEWENHAM him. The jury having found a verdict for the plaintiff, E. S.
 v. him, on the part of the defendant, in Easter Term, obtained
 SMITH. conditional order to have the verdict entered for the defendant
 or for a new trial. Cause was now shown against that conditional
 order. The facts of the case are fully stated in the Lord Chief
 Baron's judgment; but the principal points discussed in argument
 and forming the subject-matter of this report, were, whether
 certain instrument of the 12th of July 1858 amounted to a proper
 appointment of the plaintiff to the office of sexton? and what
 the parol evidence of the maker of the instrument was admissible to
 show that it was not, in fact, an appointment, or was not intended
 to operate as such?

R. Armstrong (with him *J. T. Ball* and *C. Coates*) showed
 cause.

The first question is, does the document of the 12th of July
 1858 amount to an actual appointment of the plaintiff? It may be
 said that the office was full at the time, and that the appointment
 it could not be made in reversion. That is not so in fact, for the
 jury have found, in substance, that there was an actual resignation
 by O'Connor, of the office, and that resignation is stated on the face
 of the document. Again, such an appointment to the office of sexton
 may be made in reversion. It is a ministerial office, and though an
 appointment to a judicial office cannot be made in reversion, it may
 in the case of a ministerial office. It is settled that a seal was not
 necessary to make such a document good as an appointment.
Saunders v. Owens (a). No particular form of words is necessary,
 provided the intention be sufficiently indicated. The document
 commences, "I certify," and ends, "To all whom it may concern"—
 words showing deliberation, and such as would be used by a person
 making an actual appointment to an office. Mr. Bourne was the
 person who, by law, had the sole right of nomination. He had
 the materials before him for judging of the qualifications of the

(a) 12 Mod. 200.

plicant; and the document would be insensible, if it were read indicating only an intention to appoint, at a future day, or an intention to appoint, subject to the approval of the curates. The defendant will rely upon the words "being appointed;" but the meaning is, "Newenham being appointed, I approve of him."—*GREENE, B.* If the proprietor of a soil says, "I approve of A B being over my lands," would not that be a present grant of a right way?—In many cases words apparently pointing to future acts have been held to create interests *in presenti*, as in the cases where instruments, apparently only agreements to demise, have been held to amount to actual demises: *Maldon's case* (a); *Holmes v. Sellar* (b). No question could have been left to the jury as to whether this was a conditional appointment; for there was no evidence whatever, in the case, from which it could be inferred that Mr. Bourne imposed any condition upon the delivery of the document.

T. T. 1869.
Eschequer.
 NEWENHAM
 v.
 SMITH.

B. Sullivan and *W. A. Exham*, in support of the conditional offer.

The jury found that there was no appointment of the plaintiff, parol, on the 12th of July 1858. We submit a question should have been left to them, as to whether the document of the 12th of July 1858 was given to the plaintiff as an escrow or as an absolute appointment. To make a document an escrow, it is not necessary that the party delivering it should say, "I deliver this document as escrow," if it appear to have been so delivered, from all the circumstances attending its execution and delivery: *Bowker v. Wodekin* (c). Mr. Bourne swore, "I gave him a letter to the curates." The plaintiff was a complete stranger to him; and under circumstances there was abundant evidence from which the jury might have come to the conclusion that there was only a conditional delivery of the document. Again, the parol evidence of Mr. Bourne was admissible to explain the language of the document itself. The words are, "I approve of James Newenham being

(a) Cro. Elix. 33.

(b) 3 Lev. 305.

(c) 11 M. & W. 128.

T. T. 1859. *Eschequer.*
 NEWENHAM
 v.
 SMITH.

appointed." The words "being appointed" are quite ambiguous for they may refer either to a present or future appointment. *Goldshede v. Swan* (a), it was held, in the case of a guarantee, parol evidence was admissible to show that the words, "in consideration of your having this day advanced," had reference to future advance, and not to a past one. So here, upon the face of the document, it cannot be determined whether the words denote a present or a future appointment. *Haigh v. Brook* (b) is an authority to the same effect. The document, moreover, imports a present appointment. Its meaning is, "I approve of the appointment of the plaintiff, so soon as that appointment shall have been made." The appointment is also invalid, as having been made in reversion. Even if it might have been so made at Common Law, the office being a ministerial one, the case is altered by the 63rd section of the Church Temporalities Act, 3 & 4 W. 4, c. 37, which enacts that the "sexton shall and lawfully be appointed by the minister," that is, the minister for the time being.

J. T. Ball, in reply.

A sexton may be appointed in reversion, notwithstanding the 63rd section of the Church Temporalities Act. The only restrictions made by that Act were in the fund for the payment of sextons, in the persons who were to appoint them to the office, and in the persons who were to have the right to remove them for misconduct. Here the appointment was made in contemplation of a vacancy. Assuming that the resignation of O'Connor, of the 12th of July, was conditional, the jury have found that the condition was performed; and therefore the office was vacant when the appointment was made on the 12th of July.

With regard to the document itself, there are only two possible constructions of it; first, that it is an absolute appointment. In support of that view we have these facts admitted—that it was signed by the only person who, by law, had a right to appoint, and that it was delivered to the person applying for the appointment.

(a) 1 Exch. 154.

(b) 10 Ad. & Ell. 308.

that it is addressed to the whole public, and is dated at "Dublin," where the living was. The plain meaning of the document is, so far as lies in me you are sexton." The only other possible construction of the document is, "I approve of the appointment, provided my curates approve of it." The jury have found that they did approve of the appointment.

Lastly, it is sought to construe the document by the parole of Mr. Bourne. Where a written document refers to an extrinsic fact, and there are two states of facts to which the reference may be pointed, parole evidence may be admitted to determine the ambiguity; but here there was no circumstance which could be referred to as making the delivery of the document conditional, except the approval of the curates; and it has been found by the jury that such approval was given.

T. T. 1859.
Eschequer.
NEWENHAM
v.
SMITH.

Cur. ad. vult.

Prior, C. B.

This was an action for money had and received, brought to try a right to the office of sexton in St. Andrew's parish, in the city of Dublin. It was proved that the defendant had received fees of the office after the 12th of July 1858; and the main question was, whether the plaintiff was entitled to the office under an appointment made on that day? It appeared in evidence at the trial that, prior to the 7th of July 1858, the plaintiff had (for about four years) acted as assistant sexton, Thomas O'Connor being the sexton of the parish, and also the parish schoolmaster. The defendant had been acting as deputy clerk, a person named Murphy being the clerk, but being a person advanced in life, and not (as stated in the evidence) having acted as such since the year 1853. On the 7th of July 1858, O'Connor addressed a letter to the vicar, the Rev. Mr. Bourne, tendering his resignation of the office of sexton, from the duties of which he proposed to retire on the 1st of August following. He accompanied the tender with a certain condition in reference to his assuming the duties, and receiving a share of the emoluments of Mr. Murphy, the clerk; which duties (as I have stated) he had for some

T. T. 1859.
Exchequer.
 NEWENHAM
 v.
 SMITH.

time discharged. It is unnecessary to refer in detail to the evidence on this subject, because the jury have found that the condition complied with by the vicar, before the appointment of the plaintiff on which he relies, was made. And this appears to have been so on accordingly, for O'Connor stated in his evidence:—"In point of fact Mr. Bourne did appoint me to the clerkship of the church verbally, immediately on the writing of that letter" (of the 7th of July); "he did afterwards, at Rathangan, on the 14th of July, appoint me as clerk; I had a personal interview with him at Rathangan, in his parlour." He further stated that, on the 12th of July, the plaintiff waited on the vicar, at his residence in the county of Kildare, and applied for the office of sexton. The vicar on that occasion, gave to him a document, all in the vicar's handwriting, in these words:—

" Dublin, July 12, 1859

" This is to certify that I approve of Mr. James Newenham being appointed to the situation of sexton of the parish of St. Andrew, in Dublin, vacant by the resignation of The Rev. O'Connor.

" WILLIAM BOURNE, Vicar

" To all whom it may concern."

What passed at the interview at which this document was given was variously represented at the trial, by the plaintiff, on the one side, and by the Rev. Mr. Bourne and Mrs. Bourne, on the other. No doubt, however, existed as to the fact that, on the 12th of July, the plaintiff solicited his appointment to the office, and that a document was on that day given to him upon that solicitation. The document, having been thus obtained upon the 12th of July, was subsequently shown to the curates. But, in the interval between that and the 15th of July, circumstances and communications took place, which resulted in a document forwarded, on the 15th of July, from Dublin, to the vicar's residence in the county of Kildare. O'Connor, who had written the letter of resignation, of the 7th of July. O'Connor stated, in his evidence, that he wrote it for the 16th, that being the day on which the vicar would receive it; that it was received back on the 17th of July, signed by the vicar.

O'Connor gave no withdrawal, in writing, of his resignation; nor was any other evidence of withdrawal given, save that of the sending of this document to the vicar. It was produced at the trial, and was in these words:—

T. T. 1859.
Eschequer.
 NEWENHAM
 v.
 SMITH.

“Rathangan, July 16, 1858.

“I hereby accept the withdrawal of the resignation of Thomas O'Connor, sexton of St. Andrew's Church, Dublin.

“WILLIAM BOURNE, Vicar of St. Andrew's, Dublin.”

It is unnecessary to refer further to the circumstances and communications connected with that document, because the jury found that this withdrawal was colourable; and in that finding the defendant's advisers have (very properly) acquiesced. There can be no doubt that the jury found rightly; for O'Connor, after his letter of resignation of the 7th, acted as clerk on Sunday the 11th of July; and after the withdrawal of his resignation, and after the appointment of the defendant to the office of sexton, acted, and has ever since acted, as clerk. He stated that his object in giving the interval of three weeks (to the 1st of August) was to give the vicar the opportunity of procuring a suitable person to succeed him. On the 16th of August, the defendant obtained a written appointment to the office of sexton; and he having received some fees, and some proceedings having been taken for a mandamus by the plaintiff in the Court of Queen's Bench, this action was brought to try the right of the plaintiff, under the letter of the 12th of June, and on the allegation that it was an appointment to the office, which, under the Church Temporalities Act, 3 & 4 W. 4, c. 37, s. 63, is an office in effect held during good behaviour.

It is not necessary, with a view to the questions which have been argued before us, to refer to any other parts of the evidence, save some portions of the Rev. Mr. Bourne's. When he was first asked, on the part of the defendant, whether he signed any document for the plaintiff? he answered, “I did sign a conditional document.” And he stated that the document produced was the document which he so signed. He stated, that he did not recollect declaring anything in particular; that he gave the document, under his hand, to the plaintiff; that he did not tell the plaintiff what to do with it;

T. T. 1859. *Erchequer.*
 HEWENHAM
 v.
 SMITH.

that he gave it into the plaintiff's hand, and the plaintiff was sworn. Dublin. A good deal of inquiry was made from the witnesses as to what passed on the occasion; and the substance and effect of the evidence was, that the plaintiff solicited the appointment; the testimonial of the plaintiff's character, which had been used on the occasion of a former application by the plaintiff for a situation at Trinity College, and which had been signed by one of the parishes of the parish, and by two intimate friends of Mr. Bourne (one of whom had formerly been his curate), was produced to him; that he gave to the plaintiff the document of the 12th of July (produced on as an appointment); and that he made no verbal statement to the plaintiff in reference to it. The defendant's Counsel asked the Rev. Mr. Bourne "Whether by the document he intended to appoint the plaintiff to the office of sexton? whether he did, by the document, point him to the office? what he meant by saying that he gave the plaintiff a conditional document?" and several other questions proposed to ascertain what Mr. Bourne's intention was in giving the document to the plaintiff. The Rev. Mr. Bourne having said "that he did not, to his knowledge, give the plaintiff any answer but what was contained in that paper; that he did not recollect that he gave the plaintiff any answer but that;" and having afterwards stated, that "by that document he never appointed the plaintiff to the office of sexton. I refused to allow any evidence of the Rev. Mr. Bourne's intention, or any parol evidence to explain the meaning of the document." But I stated to the Counsel, that I would receive evidence of the circumstances showing the position of the parties, the relation in which the Rev. Mr. Bourne stood in reference to the parish, and his known ordinary course and practice in the appointment of ministerial officers of the parish. It appeared that he was not much advanced in life; that he resided in the county of Kildare; that he occasionally came to Dublin, and stayed there for some time; and that, on those occasions, he attended, nominally, to the concerns of the parish and the service of the church, though the officiating ministers were the curates. He was asked, "When vacancies of the office of sexton took place, what practice did you adopt when filling these vacancies?" He answered, "I used to fill them, subject to the

consent and approbation of my curates;" and he added, that such approbation, in the present instance, was not made known to him. He was then asked, "Whether, when he wrote the document, he did it in his ordinary way, *in reference to that practice?*" This was objected to; and I held that this was only another form of offering the evidence of intention which I rejected; that the inference as to the vicar's intention could not be proved by his own testimony; and that if the practice could be referred to for the purpose of expounding the document, this must be done by the Court, construing the written instrument by reference to its subject-matter, and by the surrounding circumstances. And I was of opinion that the mere fact that the vicar used to appoint the officers, subject to the consent of the curates, was not sufficient to superadd to the contents of the instrument of the 12th of July a condition that it should be subject to such consent, or to give to any words contained in it the import of such a condition.

The jury, on questions which I submitted to them, found, firstly, that there was no *verbal* appointment of the plaintiff to the office. Secondly, that the condition annexed to O'Connor's resignation, of the 7th of July, was complied with by the vicar before the appointment of the plaintiff, of the 12th of July. Thirdly, that O'Connor, by agreement between him and the vicar, made his resignation absolute before the withdrawal of his resignation, of the 15th or 16th of July. Fourthly, that the withdrawal was colourable, not with the intention of any party that O'Connor should retain the office of sexton, but for the purpose of defeating the appointment of Newenham, and with the intention that the resignation of the 7th of July should remain operative; and, fifthly, that the written appointment of the plaintiff, of the 12th of July, was approved of by the curates, before O'Connor's withdrawal of his resignation, of the 15th or 16th of July. The last finding would have disposed of the objection, if it otherwise applied, that the instrument of the 12th of July was subject to the consent and approbation of the curates; unless indeed it were also necessary that such assent should be communicated to the vicar, before such appointment would take effect. On these findings, I directed the jury to give their verdict for the plaintiff;

T. T. 1859.

Exchequer.

NEWENHAM

v.

SMITH.

T. T. 1859. telling them, that the instrument of the 12th of July amounting to a valid appointment to the office.

Eschequer.

NEWENHAM

v.

SMITH.

The defendant's Counsel objected; and called upon me "to ask the jury a question, whether the document of the 12th of July was delivered by the Rev. Mr. Bourne as an appointment to the office of sexton?" Counsel for the defendant also submitted that there was evidence to go to the jury that the document of the 12th of July was never delivered by the Rev. Mr. Bourne as an appointment of the plaintiff to the office of sexton; that I should leave to the jury the question, whether the instrument was at all delivered as an appointment? This I refused to do, but directed the jury as I have stated; reserving leave to the defendant to move to enter a verdict for him, if the Court should be of opinion that I ought to have so directed, and that the appointment of the plaintiff to the office had not been made conditional order for entering a verdict for the defendant, or a new trial, having been obtained, upon showing cause against that conditional order, several questions were argued before me. First, it was contended that, supposing this instrument of the 12th of July did operate as an appointment, it was, nevertheless, a reversionary appointment to take effect at a future day; that is to say, it was a reversionary appointment, and therefore void.

Against this it was contended, by the defendant's Counsel, that as the office of sexton was a ministerial office, an appointment to it, according to several authorities, might be made in reversion, distinguishing it from a judicial office. Secondly, it was urged that this was not a reversionary appointment at all, and that in substance and in fact it was an appointment on an actual resignation. It certainly is laid down, in several of the books, that in the case of a judicial office, an appointment cannot be made in reversion; but that in the case of a ministerial office it may. But here it appears, upon the face of the appointment itself, that it was made upon a vacancy created by an actual resignation by Mr. O'Connor of the office in question; and the jury found, that the condition mentioned in O'Connor's resignation was complied with before the plaintiff's appointment. In the

view of the case, it is unnecessary for us to consider the rule of law referred to, or its application to the particular office now in question.

T. T. 1859.
Eschequer.
 NEWENHAM
 v.
 SMITH.

It was further contended, that there was that in the manner in which the appointment was given, from which the jury ought to have inferred, or at all events that there was evidence on which they ought to have been told, that they were at liberty to infer that it was not intended to operate as an appointment at all; and upon this part of the case the defendant's Counsel contended, first, that this was a case in which the document might be treated as an escrow, not to be acted on until something further was done; and, secondly, that the document might be explained by parol evidence, like a guarantee, which, they argued, was capable of such explanation. As to the first point, that this document was delivered as an escrow, and was not intended to be an absolute appointment, perhaps the defendant is not in strictness entitled to rely upon it; for that view was not, distinctly, presented at the trial. However, it may have been intended to be included in the requisition made to me to leave to the jury the question whether it was delivered *as an appointment*; and I am not disposed to scan too nicely the terms used by Counsel in calling for a direction, in the hurry of *Nisi Prius*, if their meaning can be fairly collected from their words. But it appears to me perfectly clear that, in the evidence given at the trial, there was nothing to warrant the sending of any such question, in any shape, to the jury. The testimony of the plaintiff and of Mrs. Bourne, and even the testimony of Mr. Bourne himself, wholly removed any foundation for any such inquiry. I am speaking of such a question as arose in *Pym v. Campbell* (a), where it was held that, if an agreement be signed, absolute on the face of it, but there is a stipulation that until some further act is done it is to have no operation, the instrument cannot be treated as signed, although it bears a writing purporting to be a signature, until the thing stipulated has been done. It was said that, in this case, the circumstances under which the instrument was delivered might have been presented to the jury to show that such a condi-

(a) 6 Ell. & Bl. 370.

T. T. 1859.
Exchequer.
 NEWENHAM
 v.
 SMITH.

tional delivery did in fact take place. The law is clear, that a stipulation may be inferred from circumstances and conduct as well as proved by words. But here there was nothing to infer any such inference. The evidence was, that the Rev. Mr. Bourne was asked for an appointment, and that he gave the document of the 12th of July without any stipulation or statement as to what the plaintiff was to do with it, and, therefore, without any stipulation or statement imposing any condition upon the signature or delivery of the document. Upon the face of the document itself, there is nothing conditional. It is not addressed to the curates. It is addressed "to all whom it may concern;" and there is nothing whatever in its contents to connect it with anything from which an inference of any condition or restriction of the ordinary import of its words could be drawn. That part of the case, therefore, is disposed of by the evidence.

Then it was contended, that parol evidence might be given to show that the instrument was not in fact an appointment, or that it was not intended by Mr. Bourne to operate as such. This is a question of great importance. It is of the great consequence that it should not be supposed, from some words to be found in the language in which Judges speak of the construction of certain written instruments, that any of the authorities warrant the proposition, in its generality, that parol evidence is admissible to explain a written instrument. They are cases in which the "*surrounding circumstances*" were all that was to be shown, in order to supply, by proof of the *subject-matter* of the contract, and the *circumstances under which it was made*, and the *position of the parties*, some matter which was necessary to make clear that which, without such proof, would be ambiguous. We are not here dealing with the well-known excepted cases in which evidence of the declarations of the party have been received to identify a person or a thing, or to rebut an equity. The class of cases relied on before us was that of instruments (such as guarantees) in which parol or extrinsic evidence was unquestionably received for the purpose of aiding the construction of the instrument. But it was *not* parol or extrinsic evidence

of the intention of the parties, it was evidence not to prove *what was intended* by the parties to the instrument, but to prove *facts and circumstances to which the document related*, and thus to make, not the witnesses, but those facts and circumstances, the expositors of the words which were used in reference towards them. See 2 *Taylor on Evidence*, p. 963, s. 1087. I shall not go at length into those authorities. I shall refer only to one of the last of them, which was not cited at the Bar, *Bainbridge v. Wade* (a). There, the case of *Goldshede v. Swan* (b), and the previous authorities, were made the subject of comment. In *Bainbridge v. Wade*, a declaration in assumpsit alleged that L. had requested plaintiff to sell and deliver to him goods in the way of plaintiff's business; and plaintiff had, at L.'s request, consented to do so, provided defendant would guarantee the payment, of which defendant, before the making of the promise after mentioned, had notice; that afterwards, and before L. was indebted to plaintiff for any goods, and when no goods delivered by plaintiff to L. were unpaid for, and no money was due from L. to plaintiff, on any account whatever, defendant, by writing addressed to plaintiff, promised in the words following:—"I hereby guarantee the payment of any sum or sums of money due to you from" L., "the amount not to exceed, at any time, the sum of £100;" that afterwards plaintiff, confiding, &c., supplied goods to L. for reasonable prices, amounting to £100, and thereby allowed L. to become indebted to him in £100; that L. had not paid; breach, that defendant had not paid. On demurrer to the declaration, it was held that the circumstances stated in the declaration might be looked at to explain the meaning of the writing, and that the writing, so explained, showed a good consideration for defendant's promise; namely, the future advances by plaintiff to L., so as to satisfy the 4th section of the Statute of Frauds. The question there plainly was, whether the words "sums of money due to you" signified sums of money "*now due*," or "*sums of money hereafter to become due*?" The facts proved showing that nothing was due at the time, the

T. T. 1859.

Eschequer.

HEWENHAM

v.

SMITH.

(a) 16 Q. B. 89.

VOL. 10.

(b) 1 Exch. 154.

33 L

T. T. 1859. *Exchequer.*
NEWENHAM
v.
SMITH.

guarantee would have had no operation, in relation to the surviving circumstances, if it referred to the past ; and thus, in order to give it operation, and to apply it to an existing subject-matter, was construed as having reference to the future. Some observations were made by the Court, in the course of the argument and judgment in that case, which explain not only what the Court decided, but the course of previous decision in this class of authorities.

It was contended that evidence of those facts could not be used for the purpose of construing the document, upon the ordinary principle that the document must be its own expositor. But Lord Campbell, in reply to this argument, observed :—"The question is, whether the state of circumstances contemporaneous with the making of the contract may not be shown?" And again :—"It seems to me something like receiving oral evidence of the state of property which is the subject of a will." And Lord Campbell, when he came to give judgment, said :—"When I look at the facts admitted by the demurrer, I see no room for doubt. No one will contend, or ever has contended, since *Meres v. Ansell*, that the effect of a written instrument can be varied by oral evidence; all that is permitted is, to show in what sense words are used, in showing what the situation of the parties was at the time." "I think that *Shortrede v. Cheek*, *Brooks v. Haigh*, *Goldshere v. Swan*, and *Edwards v. Jevons*, were all properly decided." Mr. Justice Erle said :—"I am surprised to find that the learned Counsel for the plaintiff, after the decisions in this Court, the Common Pleas and the Exchequer, disputes the doctrine, that evidence of the circumstances of the parties may be let in to explain the meaning of an instrument." In this case, I, perhaps, allowed too large a latitude ; for I permitted evidence to be given of the practice of Mr. Bourne with reference to the appointment of these offices ; and the only piece of evidence which did exist, by which it was possible to construe that instrument, was the evidence given of that practice. But there is nothing in the form of the instrument which in any manner affects the appointment, by any reference to the approbation of the curates. There is no postponement

ment of the appointment until an opinion had been obtained from the curates. It is not addressed to the curates. There is no ambiguous word in it, which the habit or practice of the vicar (supposing it were admissible for this purpose, without any reference to it in the instrument) could explain. The vicar's habit and practice in these matters was of his own creation, and he might have abandoned or adhered to it, as he pleased. Whether he did or did not intend to act upon it could only be determined by the contents of the instrument. If the uniform practice of the vicar had been to depute to the curates the making of the appointment, and if the instrument had been addressed to them, the argument might have been urged (whether successfully or not it is unnecessary to consider) that the usage might be referred to as a circumstance connected with the appointment, and explanatory of the term "approve." But the reverse of this was the fact. There is, therefore, no ground for importing any meaning into the document, derived from the habit or practice of the vicar.

These portions of the case being thus disposed of, the only question which remains is whether, taking this instrument as it stands, incapable of explanation by parol evidence, and deriving no explanation inconsistent with its being absolute in its import, from extrinsic circumstances, it operates, by its terms, an absolute appointment? and I confess I think it difficult to understand how otherwise it can be construed. It states a vacancy in the office of sexton. It states that the vicar who signs it, and who alone, by law, has vested in him the power, and has also cast upon him the duty, of filling that vacancy, "approves of the plaintiff being appointed to the situation." The vicar, knowing that the curates are in the actual administration of the affairs of the parish, passes them by, and delivers the paper to the person who solicits the appointment, "to all whom it may concern." Who are those persons? Manifestly, all the parishioners, who are all interested in the appointment. It suggests no one upon whose concurrence any future decision is to rest, or any future act is to be done. Such being the frame and language of the document, and such the circumstances under which it was given, it appears to me that it can, in reasonable construction,

T. T. 1859.

Eschequer.

NEWENHAM

v.

SMITH.

T. T. 1859. *Eschequer.*
NEWENHAM
v.
SMITH.

bear no other meaning than that of an appointment to the office of the person of whom the vicar signifies his approval, to all who may be concerned in the appointment. No particular form of words is necessary to constitute an appointment. Analogous cases, in the subject of the creation of estates, were cited in the argument: *Maldon's case* (a); *Holms v. Sellar* (b). It is unnecessary to refer further to them. In a vast variety of cases, words of promise or agreement for enjoyment, though contemplating future acts of performance, have been held to operate as an actual demise. We do not perhaps, conjecture that the Rev. Mr. Bourne really did intend to do something else besides what he wrote. I can only say, *non dixit*. We are obliged to apply to particular cases general rules of law; and, upon the whole, we are of opinion that this was a valid appointment, and that the verdict cannot be disturbed on any of the grounds on which it is sought to be set aside.

RICHARDS and GREENE, BB., concurred.

FITZGERALD, B.

I concur in the judgment, though I confess that the result of this case is not satisfactory to my mind. Of the questions discussed before us, the only one of substance appeared to me to be the question, whether the letter of the 12th of July operated as a present appointment? I confess I think the most obvious construction of that instrument to be, that it was not an appointment, but an approbation by Mr. Bourne of an appointment made or to be made by another. That raises a question as to the construction of the language of the instrument, because it is not contended that the words were absolutely insufficient to operate as a present appointment. We must then apply the ordinary rules of construction, and of these the most elementary are to consider the condition and capacity of the parties to the instrument, and the consideration on which it is founded. One of the parties is the plaintiff, who was capable of accepting a present appointment, and the other is Mr.

(a) Moore 8; S. C., Cro. Elis. 33.

(b) 3 Lev. 305.

Bourne, who was not only capable of making an appointment, but was the only person who, by law, had the power of making that appointment. Then what is the consideration of the appointment? It is the vacancy of the office, it being one which Bourne had the power of making the appointment to, and which it was his duty to fill up. That being so, it seems to me to fix, beyond all doubt, the meaning of the language of the instrument, if, as is admitted, it will bear the meaning of a present appointment. There is no doubt that the authorities show that where the language of an instrument, not under seal, is ambiguous, evidence of collateral circumstances may be resorted to; but I apprehend those authorities will be found limited to the cases of which my LORD CHIEF BARON has spoken, where the instrument contains a reference to extrinsic facts and occurrences, but which facts it refers to in ambiguous language; there you may refer to evidence of the facts, for the purpose of fixing the meaning of the language. I apprehend the authorities go no farther than that; and even if they did, what was the evidence sought to be given in this case? It was only the evidence of the writer of the instrument itself, as to what took place between him and the other party on the occasion of its being written. A party cannot thus explain the meaning of what he has himself written. For these reasons I concur in the judgment, although I own the result of the case is not entirely satisfactory to my mind. This, however, is owing to matters of fact, and not of law, which matters of fact I see no mode of investigating further, if a new trial were directed.

T. T. 1859.

Eschequer.

NEWENHAM

v.

SMITH.

H. T. 1860.

Exchequer.Jan. 24, 26,
27.

ATTORNEY-GENERAL v. MAXWELL

It is not necessary, in order that legacy duty should be payable in respect of the personal estate of any person, that such person should have acquired in his lifetime a present right to receive the fund charged.

Upon the marriage of W., a sum of £15,950 was settled upon certain trusts for W., and A. his wife (in bar of her share in his personal estate), and the issue of the marriage; and it was provided that if there should be no issue, or, being such, they should all die before they became entitled to a vested interest in the fund, then, after the decease of W. and A., the fund was to be held "for the only proper use and behoof of W., his executors, administrators and assigns." W. died, leaving issue B, C and D, who were his next-of-kin. B, C and D then died without having attained a vested interest in the fund, and the trust in favour of W.'s estate became absolute, subject to A.'s rights. At B's death, his next-of-kin were C, D and A. The next-of-kin of C were D and A., and D's sole next-of-kin was A. The defendant, who was the personal representative and residuary legatee of A., also took out representation to W., B, C and D.

Held, that he had received or retained the fund (within the meaning of the 37th section of the 5 & 6 Vic., c. 82), for the benefit of the personal representatives of W., A., B, C and D, i. e., of himself, and that he was liable for legacy duty in respect of each of those five estates.

INFORMATION for legacy duty.—The information contained four counts; and the first count was in debt, for £450. 16s. for duty on certain shares of the personal estates of William Bayly, William Cromwell Bayly, Isabella Sarah Bayly, and Anne Bayly administered by the defendant. The second count was £400. 6s. 9d., duty in respect of the personal estate of the said Anne Bayly, which came to the defendant as her executor and residuary legatee. The third count was for £851. 2s. 9d., due on residues of personal estates of William Bayly, William Cromwell Bayly, Isabella Sarah Bayly, Anne Bayly, and the Hon. A. Bayly, due by defendant as the personal representative of such persons respectively; and the fourth count was for £851. 2s. 9d. on an account stated. Plea to the first count—As to £40, part of the £450. 16s. therein mentioned, being portion of the share of William Cromwell Bayly, Isabella Sarah Bayly, and Anne Bayly, defendant satisfied and discharged the same, by payment before brought; and as to the residue of the said sum of £450. 16s. *debet*. Plea to the second count—Payment. Plea to the third and fourth counts—That the sum of £851. 2s. 9d., therein mentioned, composed of the two sums in the first and second counts; and as to the sum of £440. 6s. 9d., part thereof, and portion of the duty on shares of William Cromwell Bayly, Isabella Sarah Bayly, and Anne Bayly, defendant satisfied and discharged the same, by payment before brought; and as to the residue of the said sum of £450. 16s. *debet*.

Bayly, and the whole of the duty on the share of the Hon. Anne Bayly, payment before action brought, and as to the residue, *nil debet*.

H. T. 1860.
Exchequer.
 ATTORNEY-
 GENERAL
 v.
 MAXWELL.

The case having come on for trial upon these pleadings, a special verdict was taken by consent, and the facts set forth in the special verdict were as follows:—That by indenture dated the 17th of October 1836, executed on the marriage of the Hon. Anne Maxwell and William Bayly, jun., the fee-simple lands of Kilcreene, the property of William Bayly, jun., were conveyed to trustees and their heirs, to the use of William Bayly, sen., for life; remainder to William Bayly, jun., for life; remainder to the first and other sons of the marriage, in tail male; remainder to William Bayly, jun., in fee. By the same settlement, a sum of £15,950, late currency, secured by bonds, bearing interest at £5 per cent., was assigned by William Bayly, jun., to other trustees, in trust, to pay the interest to William Bayly, jun., for life, and after his decease to pay out of the interest £600 per annum to Anne Maxwell, for life, in bar of dower and distributive share of personalty, and to pay the residue of the interest for the maintenance of the younger children; and if there should be no child of the marriage, or if all such should die under twenty-one, unmarried and without issue, then to pay said residue to the executors, administrators or assigns of William Bayly, jun.; and, after the death of the survivor of the husband and wife, upon trust, as to the said sum of £15,950, if there should be issue of the marriage one only son, then (subject as aforesaid) to pay same to him at twenty-one; or if he should die under that age, leaving issue, to his issue in equal shares; and in case there should be an eldest or only son, and one or more child or children, or no son, and one or more daughter or daughters, then to pay £5000, part of the said sum of £15,950, amongst said younger children or daughters, or their issue, as William Bayly, jun., should appoint, and in default of appointment, equally among them as tenants in common; the share or shares of a son or sons to be paid and transferred to him or them at twenty-one, and of a daughter or daughters at twenty-one or marriage. Provided always, that if such younger children, being sons, should die under twenty-one, without leaving lawful issue living at their death, or, being daughters, should die under twenty-one or

H. T. 1860.
Eschequer.
 ATTORNEY-
 GENERAL
 v.
 MAXWELL.

marriage, then that their shares of the £5000 should, in default of appointment, go to the survivors, and be considered a vested interest or interests, and be payable as the original share. And as to the residue of the £15,950, after payment of the £5000, in trust, after the decease of the survivor of the husband and wife, to lay out and invest same in the purchase of lands in Ireland, to be settled on the same uses as the settled lands: and in case there should be no issue of the marriage, or, being such, they should all die before they became entitled to a vested interest in the £5000, as to the residue of the £15,950, then that the trustees should stand possessed of said sum of £15,950 and interest, after the decease of the survivor of the husband and wife, for the only proper use and behoof of the said William Bayly, jun., his executors, administrators and assigns.

That there was issue of the marriage of William Bayly, jun. and Anne Maxwell, three children, William Cromwell Bayly, Isabella Sarah Bayly, and Anne Bayly. That William Bayly, jun., the husband, died in September 1840, intestate, without having exercised the power given to him by the settlement in favour of his widow Anne Bayly, and his three children, surviving: and that on the 24th of November 1840, administration of his estate and effects was granted to Clayton Bayly Savage. That William Cromwell Bayly died on the 29th of May 1849, Isabella Sarah Bayly on the 2nd of July 1849, and Anne Bayly, jun., on the 24th of March 1850, and that said three children died intestate, unmarried, and under the age of twenty-one. That the Hon. Anne Bayly, the mother and sole next of-kin of the survivor of the three children, died on the 26th of November 1857, and by her will bequeathed all her property to the defendant, and made him her executor; and that, on the 29th of May 1858, probate was granted to him. That Clayton Bayly Savage having died, administration *de bonis non* to William Bayly, jun., was granted to the defendant, in July 1858; and that he obtained administration to Anne Bayly, jun., on the 8th of January 1858, and to William Cromwell Bayly and Isabella Sarah Bayly on the 22nd of February 1859. That on the 31st of December 1858 the defendant furnished a residuary account of the personal estate

William Bayly, jun., to the amount of £13,204. 15s. 11d., the balance of the settled fund; on which the duty was assessed to £132. 0s. 11d. And also an account of the estates of William Cromwell Bayly, Isabella Sarah Bayly, and Anne Bayly, jun., mounting respectively to £4611. 18s. 11d., £6053. 12s. 7d., and £9008, all portions of said settled fund, on which the duties severally assessed were £107. 12s., £121. 1s. 5d., and £90. 1s. 8d. That in respect of those three shares defendant paid the sum of £40. The like account of the personal estate of the Hon. Anne Bayly was furnished to the sum of £1344. 11s. 6d., also portion of the trust fund, on which the duty was assessed to £400. 6s. 9d., and this sum was paid by the defendant. That all those residuary accounts (except that of the Hon. Anne Bayly) were furnished under a written protest; and that the Hon. Anne Bayly never took out administration to any of her said three children, or paid any duty for their personal estates.

H. T. 1865:
Exchequer,
ATTORNEY-
GENERAL
v.
MAXWELL

R. Jebb, with F. Macdonogh, for the Crown.

The Crown first claims duty from the defendant as executor of the Hon. Anne Bayly. This claim has been satisfied by the defendant, and the fund on which it is payable is admitted to be the fund in the settlement. The next claim is for duty payable by the defendant, as administrator of William Bayly, jun., who died in 1840, intestate, and who, under the trusts of the settlement, and in the events that happened, viz., on the death of all the children under age and unmarried, became absolutely entitled to the fund. It is settled that where the ultimate limitation of a fund is to the executors, administrators and assigns of a party, the words "executors" &c., are words of limitation, and the party takes the fund as his absolute property: 2 *Wms. Bldgs.*, p. 1015; 2 *Jar.*, pp. 103-4. The personal representative takes the fund as assets of William Bayly; not however as *persona designata*, but as trustee for the persons beneficially entitled to the residue: *Lloy v. Watkinson* (a). Those persons are the persons who were the next-of-kin at the time of the intestate's death: *Harrington v. Harte* (b); 2 *Jar.*, p. 103;

(a) 17 Beav. 471.
VOL. 10.

(b) 1 Cox, 131.
34 L

H. T. 1860.
Eschequer.
 ATTORNEY-
 GENERAL
 v.
 MAXWELL.

and his widow was excluded under the provisions of the settlement. Taking the fund in that capacity, the defendant is liable for the duty, under the 37th section of 5 & 6 Vic., c. 82.

The next claim against the defendant is as administrator of William Cromwell Bayly. The three children having become equally entitled to the fund, when William Cromwell Bayly died in 1848 under age and unmarried, his next-of-kin became entitled. Those persons were the two remaining children and his mother. Those persons were therefore, or the administrator representing them, were liable, under the 37th section, to the duty on William Cromwell Bayly's part of the fund. In the same year, 1849, another devolution of the fund took place by the death of Isabella S. Bayly, when the remaining child and her mother became entitled to her share, and were therefore, liable to duty in respect of it. The last devolution took place in March 1857, when Anne Bayly, jun., died, and her mother as her sole next-of-kin, became entitled to the entire fund; and was therefore, liable to duty on so much of it as she derived from Anne Bayly, jun. These are the five duties claimed, and they arise on different estates, not partial interests in the same fund. They might all (as the mother did) have disposed of their part by will, if capable of making one. It was an interest in possession to the mother, for her partial life interest merged in her right as principal. The liability for which the Crown contends does arise upon the provisions of the statute; but the very principle under discussion was assumed as law in *The Attorney-General v. Malkin* (a). That case was founded on *Daniel v. Dudley* (b). He also cited *Holloway v. Clarkson* (c); *Allen v. Thompson* (d); *In re Hillas* (e).

B. Stephens (with *H. Hamilton* and *H. Joy*), for the defendant.

The fund remained subject to the trusts of the settlement until the death of the Hon. Anne Bayly. Until then, no one was entitled to the fund.

(a) 2 Phill. 64.

(c) 2 Hare, 521.

(b) 1 Phill. 1.

(d) 7 Beav. 72.

(e) 2 Ir. Jur. 36.

to receive the *corpus*. The fund has now, for the first time, been paid out to anyone; and three duties are now demanded in respect of that one enjoyment. First, the Crown claims duty at £3 per cent. upon the entire fund, as assets of the Hon. Anne Bayly. That has been paid. Duty is then claimed upon the entire fund in this way:—The Crown treats the fund as if it had existed in specie a valuable interest at the death of William Bayly, jun., in 1840, and had then passed over to his three children, his wife being barred by the settlement; and it claims another duty upon the entire, at £1 per cent, as if the three children had actually divided the fund between them. Then, assuming that they received the shares, the Crown claims duty upon the shares of the children as they died, and that in respect both of the original and accruing shares, until the death of the last surviving child. The defendant disputes his liability to any duty, except in respect of the estate of the Hon. Anne Bayly; and it is submitted that, upon the true construction of the Legacy Duty Acts, duty is not payable upon any residue, until some person entitled to receive the fund upon which the duty is charged has actually received it in his lifetime. A liability to duty, in a case like the present, is not only not provided for by the Legacy Duty Acts, but is contrary to the whole spirit of the legislation upon the subject. It may be admitted that, if the ultimate trust for William Bayly came into operation, the fund would have become general assets; but up to the death of the last surviving child, the residue was impressed with a trust for conversion, and, therefore, up to that time no duty could be imposed. Independently of the question of conversion, the interest of William Bayly, jun., at his death, in 1840, was a remote contingent reversionary interest; but duty is imposed upon the beneficial enjoyment of some person entitled to call for payment. Not one of those children could ever in his lifetime have become entitled to any portion of this contingent fund. The contingency upon which it would come into existence as assets of William Bayly was twofold; first, the death of the children; and, secondly, their death under age. Duty is not imposed upon the receipt by a representative, but upon the transfer to a beneficiary. Here

H. T. 1860.

Exchequer.

ATTORNEY-

GENERAL

v.

MAXWELL.

H. T. 1860.

Exchequer.

ATTORNEY-

GENERAL

v.

MAXWELL.

the receipt is all imaginary. The Act does not provide a constructive receipt; and a statute, relied upon as imposing a duty upon the subject, must be clear in its terms: *Dickens v. Pope* (a). The first Act imposing the duty was the 25 G. 3, c. 1. That imposed the stamp upon the receipt. The provisions of the statutes down to the 5 & 6 Vic., c. 82, show that it is imposed upon the enjoyment. In that sense the fund was received or retained for the benefit of those parties. *Attorney-General v. Malkin* does not decide the point. It is not argued; and the disposition of the property was by will, not by a deed.

At all events, £5000 of the fund vested in the surviving child under the provisions of the settlement; and it is only liable to two duties, viz., on the transmission to her and to her mother.

They also cited and commented on *Barrett v. The South and Darlington Railway Co.* (b); *Attorney-General v. Manners* (c); *Hobson v. Neale* (d); *Attorney-General v. Brunning*; *Mules v. Jennings* (f); *Tomkins v. Ashby* (g); *Drake v. The Attorney-General* (h); *Platt v. Routh* (i).

F. Maedomogh, in reply, was stopped by the Court.

PRICOR, C. B.

We do not consider it necessary to call on the Counsel for the Crown to reply. The main question arises upon the words of the 37th section of the Legacy Duty Act, 5 & 6 Vic., c. 82, which I believe, in exact conformity with the terms of the 6th section of the former English statute, 36 G. 3, c. 52. The 37th section of the 5 & 6 Vic., c. 82, contains the following enactment:—"And be it enacted, that the duties by this Act granted on legacies and successions, and on residues and shares of residues, given by the

(a) 7 Ir. Law Rep. 74, 187.

(b) 2 Scott's N. R. 337; S. C., 8 Scott's N. R. 641.

(c) 1 Price 411.

(d) 17 Beav. 178; S. C., 8 Exch. 368.

(e) 4 H. & N. 94.

(f) 8 Exch. 830.

(g) 6 B. & C. 541.

(h) 10 Cl. & Fin. 257.

(i) 3 Beav. 257.

villa, or passing by the intestacies of persons deceased, and payable out of their personal estate, shall be accounted for, answered and paid by the person having or taking the burden of the execution of the will or other testamentary instrument, or the administration of the personal estate of any person deceased, upon retainer for his own benefit, or for the benefit of any other person, of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, which he shall be so entitled to retain, either in his own right, or in the right or for the benefit of any other person; and also upon delivery, payment or other satisfaction or discharge whatsoever of any legacy, or any part of any legacy, or of the residue of any personal estate, or any part of such residue, to which any other person shall be entitled." If the provisions of that section only were considered, and if there were no decision affecting the question, it would appear to me that there would be no room for doubt that the legacy duty attached upon every one of the estates for which it is now sought to be charged by the Crown.

The defendant represents the personal estates of William Bayly, jun. (the husband), of the Hon. Anne Bayly (the wife), and of each of their three children, issue of the marriage contemplated by the settlement of the 17th of October 1836. According to the construction which, I think, we must give to that settlement, this property (which must be regarded as personal estate unconverted) belonged to the husband absolutely, in the events specified in the settlement; all which events have occurred. In that personal estate the wife, being barred by the settlement of her rights under the Statute of Distributions, acquired no interest except as the next-of-kin of her three children, all of whom she survived. Let us suppose that letters of administration were granted to distinct persons for each of those five personal estates; and let us then consider what should have been done in dealing with the fund in reference to the rights of each such personal representative. The personal representative of William Bayly, jun., the husband, would be, in the first instance, entitled directly to the whole *corpus* of the fund. But he would be so entitled as trustee (on the supposition

H. T. 1860,
Exchequer.
ATTORNEY-
GENERAL
v.
MAXWELL.

H. T. 1860. *Eschequer.*
 ATTORNEY-
 GENERAL
 v.
 MAXWELL.

that there were no debts) for the personal representative of Hon. Anne Bayly, who, having survived her husband and all children, became entitled, first, to a share in the personal estate of each of her two children who first died, and afterwards (as next-of-kin) to the entire personal estate of the third child. That trust for the personal representative of the Hon. Anne Bayly would be subject to a prior trust for the personal representative of each of those children; for if there were any charges on their personal estates, those charges must be paid in priority to the claim of the personal representative of their mother. Could it be contended that each of those five personal representatives would not be entitled, according to the very terms of the Act, "a person" for whose "benefit" the personal representative of William Bayly, junior, would be immediately entitled to the possession of the fund, would receive it, and retain it? Could it be contended that he would not receive it first, for his own benefit, as representative of William Bayly, junior, and next, for the benefit of each of those persons thus interested as personal representatives, in respect of those distinct estates? [If those questions can be properly answered in the negative, this will be attached, in respect of each estate, under the express terms of the statute. All through the discussion, the defendant's argument has been directed to establish, or has assumed, that the duty cannot be payable in respect of the personal estate of any person, unless that person had, *in his lifetime*, acquired a present right to receive the fund. But the statute, in express terms, applies the obligation to pay the duty to the time at which the money is received or retained *for the benefit of the receiver, or for the benefit of some other person*; and, in order to determine whether or not the duty attaches, we have only to consider whether, at the time when the personal representative of anyone receives or retains the money, there was any "person" in existence for whose "benefit" he received or retained it; and if there were more than one, how many such persons there then were. It is plain that if these were distinct personal representatives, he who would receive it would receive it for the benefit of all those personal representatives. The matter may be illustrated

us :—Suppose that each of the various persons, in reference to whose estate the duty is sought to be charged, had left debts, before the representative of the individual next in order entitled could receive anything out of the personal estate of the party of whom that individual was next-of-kin, the debts of that party should be paid; and the representative who should receive that party's personal estate would receive it charged with the payment of those debts. But see whether the case now before us is not still stronger than that which I have supposed. Here, the same individual is clothed with the capacity of personal representative of each of the five parties; and he takes the fund, or shares of it, in each of these capacities, for his own benefit. The defendant takes the fund, in the first instance, as the personal representative of William Bayly, jun., who was previously entitled to it on the deaths of all the children of the marriage, under age and unmarried; but in that capacity he receives and retains the fund, for the benefit of himself, as the personal representative of the Hon. Anne Bayly, who was entitled to the whole fund when she died, as the mother of her deceased children; but, in order to retain the fund in that capacity, he must also retain it in the capacity of personal representative of each of Mrs. Bayly's children, through whom alone *she* became entitled, first, to certain portions, and then to the whole residue of the fund; in other words, he is, as to each of those personal estates, in effect a trustee for himself. Again, suppose that the representative of William Bayly, jun., was not the present defendant, but a stranger to the family, and suppose that he obtained possession of the fund, as a trustee or stakeholder for all persons interested—suppose that the present defendant, as the representative of the Hon. Anne Bayly, should demand from such representative of William Bayly, jun., a transfer of the fund, it appears to me that the personal representative of William Bayly, jun., would be entitled to say, in answer to that demand, "Under the circumstances of this property and of this family, I cannot transfer this fund without a receipt or release from the personal representative of each person deriving immediately, or through those of whom they were of next-of-kin, from William Bayly, jun. Each

H. T. 1860.

*Eschequer.*ATTORNEY-
GENERAL

v.

MAXWELL.

H. T. 1860: "of those persons may have left debts; the personal representative
Eschequer. "of each may, at this moment, be answerable at least to the extent
 ATTORNEY- "of funeral expenses (a), since personal assets exist. Without receipt
 GENERAL "receipt or release, I decline to pay over money which I may be
 v. "afterwards obliged to refund." It appears to me that the personal
 MAXWELL representative of William Bayly, jun., would be entitled to use this
 language, and to withhold from the defendant, Mr. Maxwell, the
 fund, until he should obtain the release or receipt, not only from
 Mr. Maxwell himself, but also of the personal representative of
 each of the three children of William Bayly, jun., and the said
 Anne Bayly. This, of course, is an illustration rather than an
 argument. But, considering the case in the various views which
 I have stated, I am very clearly of opinion that Mr. Maxwell, by
 uniting in himself all the different capacities of personal representative
 of the husband of the marriage, contemplated in the will of 1836,
 of each of the three children of that marriage, and of their mother;
 retained the fund "for the benefit" of the personal representative
 of each of these persons, that is, of himself.

So I should consider this case, if there were no authority upon the
 question; but we are not left without such authority. There is no
 difference in principle (as it appears to me) between the case before
 us and that of *The Attorney-General v. Malkin* (b).—[His Lordship
 stated the facts of that case].—The point principally at issue
 there was not the one raised here. But the proceeding there was
 one which directly involved the question. It was a proceeding
 to recover legacy duty. The point there discussed was, the effect of
 the limitation to the executors or administrators of Mrs. Carr; and
 the Lord Chancellor held that the fund was not to be treated as
 the property of the next-of-kin, taking it *as such* under the will,
 or of the administratrix, taking it *as such* under the will; but
 that the effect of the will was to give the fund to the persons
 to whose personal representatives (executors or administrators)

(a) See *Tagwell v. Heyman* (3 Camp. 298); *Rogers v. Price* (3 Y. & J. 388);
Brice v. Wilson (8 Ad. & Ell. 349, n.); *Green v. Salmon* (8 Ad. & Ell. 348);
Rees v. Shaw (3 M. & W. 350); 3 Wms. *Exors.*, pp. 1621, 1622.

(b) 2 Phil. 64.

it was, in terms, bequeathed, and so to make it part of that person's personal estate. But the decision of the Court involved the determination, or the assumption in the affirmative, of the very question on which we have now to adjudicate. The liability to the duty was necessarily declared by the Court, though the point was not raised in argument. In that respect the case is so far an authority, because the two duties with reference to which (as I understand the report in 2 *Phil.*, p. 64) the proceeding was instituted, and the controversy arose, were, first, the duty payable on account of the estate of Mrs. Carr; and, secondly, the duty payable on account of the estate of her husband. It was, in effect, determined or assumed in the decision, that the title to the wife's estate could not be made out by her personal representative, without the taking out also of representation to the husband. The present case is also, in substance [(as it seems to me), precisely similar to that of *Attorney-General v. Malkin*, in reference to the objection that the *corpus* of the fund could not have been received by anyone, until after the death of the surviving child of Mr. and Mrs. Bayly; because, in *Attorney-General v. Malkin*, both Mr. and Mrs. Carr having died in the lifetime of the testator's widow (who was the first legatee for life), the fund could not, of course, have been received by Mr. or Mrs. Carr, the two parties in reference to whose estates (as I understand the report) the duty was claimed.

H. T. 1860.
Exchequer.
 ATTORNEY-
 GENERAL
 v.
 MAXWELL.

The only point that remains is, that is that which was raised by Mr. *Hamilton*, at the close of his argument, as to the time of vesting of the shares of the children. But it appears to me that whatever might have been the effect of the settlement, as to vesting, if the son had died within age, leaving issue, the effect of the settlement, in the events that happened, must be taken to be, that the share did not vest in the son, since he did not attain the age of twenty-one, nor in either of the daughters, since neither of them attained the age of twenty-one, or was married. Such was the effect of the clause relating to the original shares; and the terms used are such, that whatever effect is given to the clause relating to

H. T. 1860. *Exchequer.* the original shares, the same must be given to the clause relating to the accruing shares.
 ATTORNEY-
 GENERAL
 v.
 MAXWELL.

Upon the whole, we are of opinion that the Crown is entitled to judgment on this special verdict.

GREENE, B., concurred.

FITZGERALD, B.

The testator, William Bayly, died in the year 1840, intestate. At the time of his death, he was, under the trusts of the settlement executed in the year 1836, entitled, subject to a life interest in his wife, to a sum of £15,950, provided his three children did not attain twenty-one, or marry. His three children died in the lifetime of the wife, who survived him, and, upon her death, the reversionary interest became indefeasible. The wife died in the year 1857, and, therefore, upon that event the reversionary interest vested in possession in the personal representative of William Bayly. That sum of £15,950 has come into the hands of the defendant. It has so come as part of the estate of Mrs. Bayly, the widow, and as part of her estate he admits his liability to legacy duty upon it. The fund has paid no other legacy duty but that. Then the question is, how did it become part of the estate of Mrs. Bayly? Not under the trusts of the settlement, for she had only a life interest. How then was it part of her personal estate, as which the defendant took it? The defendant is the personal representative of Mrs. Bayly, and of each of the children. It became her personal estate in satisfaction of the claims which she had upon the estates of the three children, and it came to her with the assent of the defendant, who is the personal representative of the three children; and then, under the very terms of the 37th section, he is liable in both his characters. But how did it come to be the personal estate of the three children? As portion and in satisfaction of their claims upon the estate of their father, William Bayly, and therefore precisely in the same way it comes under the terms of the 37th section. That is one view of it.

The other question was with reference to the sum of £5000. It

was said that, under the terms of the settlement, that sum vested absolutely in the last liver of the younger children, and that, therefore, the only duty payable is the residuary duty. That point turns upon the construction of the settlement. Now it appears to me unnecessary, upon this question, to determine whether the shares did vest or not. If they vested at the birth of the children, then plainly the word "vesting" cannot be used in its ordinary sense. The defendant admits that. What is the sense put upon it if that be so? The two ordinary meanings are "vesting in interest" and "vesting in possession." But vesting in possession is the time of payment; and if you put that meaning on it, the argument fails.

H. T. 1860:
Rechequer.
ATTORNEY-
GENERAL
v.
MAXWELL.

HUGHES, B., having been Counsel in the case, took no part in the discussion.

MAGEE v. MARK.

Jan. 31.

THIS was an application on behalf of the defendant, that the proceedings of the plaintiff might be stayed until he should give security for the costs to be thereafter incurred.

The affidavit of the defendant stated that the present action had been brought against him for the recovery of penalties, on the grounds of alleged acts of bribery, committed by him at the election of a Member of Parliament for the Borough of Newry, in the month of May 1859. That the plaintiff was a mere day labourer, at one shilling a-day, very poor, and wholly unable to pay any costs; that he was only the nominal plaintiff, and had been put forward by other persons, who were politically interested in setting aside the return of Peter Quin, Esq., the present Member of Parliament for the Borough; and that the present action, and several others, had been

In an action for penalties, under the Corrupt Practices Act, 17 & 18 Vic., c. 102, an application for security for the costs to be thereafter incurred was refused, the application not having been made until after there had been an abortive trial; and notice of trial had been again served.

H. T. 1860.
Exchequer.
 MAGEE
 v.
 MARK.

instigated by said persons in the name of pauper plaintiff, *namely* to recover penalties, but in reality to extract information to be in support of a petition against Mr. Quin's return, pending in House of Commons: that said persons were liable for the costs of the action to the plaintiff's attorney, and that the defendant was not so liable; and that said persons were attempting, without any peril of costs, if they should fail, to extract in this action desired information. That he, the defendant, had a good and substantial defence on the merits to the action; and that he did not commit any of the acts of bribery imputed to him by the plaintiff. That the case had been tried by a special jury at the Sittings after last Michaelmas Term, and that there had been a verdict, in consequence of the jury having been unable to agree. That notice of trial had been served for the approaching Hilary Sittings, and that the application would have been made earlier, but that he, the defendant, was unwilling to incur expense until he was served with notice of trial.

Affidavits were made to oppose the motion, in which the plaintiff denied that he had been put forward by any person to bring the action; that the defendant had no defence to the action, and that there was no person, except the plaintiff himself, directly or indirectly interested in the penalty sought to be recovered: that he did not bring the action for the purposes mentioned in the defendant's affidavit, and that he did not care about the result of the election petition. The plaintiff's attorney, in an affidavit made by him, denied that there was any agreement, direct or indirect, between him and any other person, that he should be indemnified for the costs; and that there was no person liable to him except the plaintiff, and that he had received his instructions for the action from the plaintiff alone.

The plaintiff further stated that it would be impossible for him to get security for costs, after the heavy expense already incurred in the prosecution of the action.

H. Law, with *F. Macdonogh*, in support of the motion.

This is an action for penalties, under the Corrupt Practices Act.

17 & 18 Vic., c. 102. The 24th section of that Act enacts that
 "In any action to recover any penalty under this Act, it shall be
 "lawful for the Court in which said action shall be brought, or any
 "Judge thereof, if they or he shall think fit, to order that the
 "plaintiff in said action shall give security for costs, or that all
 "proceedings therein shall be stayed." That section confers a
 new and enlarged jurisdiction on the Court; and from it and the
 13th section, which provides for security for costs being given in
 criminal cases, the inference is that the Legislature intended to
 provide a protection for defendants in all cases where the plain-
 tiff was not a solvent person, or was put forward by others for
 ulterior purposes. In *M'Lester v. Quin* (a), in the Court of
 Common Pleas, security was enforced in a case precisely similar in
 its circumstances to the present, except that it was made at a differ-
 ent stage of the cause. We have it here sworn that the plaintiff
 is a mere day labourer, and wholly unable to pay any costs; that
 he has been put forward by other persons for political purposes, and
 that he has no interest in the result of the action. It may be said
 that, in *M'Lester v. Quin*, there was no affidavit made on behalf
 of the plaintiff, but here the affidavit of the plaintiff is an entire
 evasion of the allegations made by the defendant.—[PUGH, C. B.
 The difficulty is, that you ought to have made this application before.
 The plaintiff has now a vested right to the costs of the last trial if
 he succeeds. Have you a right now to put him in the position of
 having to determine whether he will go on or not?—We do not
 ask for costs retrospectively.—[HUGHES, B. Does your client
 assign any reason for not making this application last Term?—
 He was unwilling to incur the expense of making the application
 until after notice of trial served, as he could not tell whether or
 not the plaintiff would go on.—[GREENE, B. How can we say
 that this is a vexatious or unfounded action, when a jury have been
 unable to agree upon the matter?—We submit that the provisions
 of the Act apply to the second trial. It is substantially a new action.
 If this were an ordinary case, the lateness of the application might
 be a complete answer to the motion; but the 24th section is a

H. T. 1860.

Exchequer.

MAGEE

v.

MARK.

(a) Since reported, 5 Ir. Jur., N. S., 94.

H. T. 1860. legislative declaration of our right to security.—[Fitzgerald
Eschequer.
 You cannot say that it was intended there should be a solvent person plaintiff in every case, because then the Legislature would have said that security for costs should be given in all cases.]—We also also that the plaintiff has been put forward by other parties: *Isant v. Brown* (a). The order has frequently been made at the stage of the cause: *Barker v. Hargreaves* (b).

MAGEE
 v.
 MARK.

D. C. Heron, contra, was not called upon.

PIGOT, C. B.

It is quite impossible that we can yield to this application: it is against all precedent and analogy. The principle is not one which requires a party, seeking security for costs, to come in at an early period. The old authorities on this subject are based upon the reason that the defendant is not to induce his adversary to incur costs by further proceedings. The provisions of this Act of Parliament appear to my mind not to afford any indication for the inference drawn from them by the defendant's Counsel. The Act contains two series of provisions; one applicable to criminal, the other to civil proceedings; and each of them shows that there ought to be some provision applicable for the discouragement of vexatious proceedings, both at the criminal and the civil side. On the criminal side, the Act gives the Court power to award costs to parties to whom in other instances it could not give them, but qualifies his right to costs, by enacting that if a party seek to get costs he must give security. Instead of imposing a restraint, that rather creates an incentive; for it encourages a prosecutor to proceed, if only he can trust his own case as far as to give security for costs.

With respect to civil proceedings, the 24th section introduces a new provision, for it frees the Court from the restraint of the rule that, where the plaintiff resides within the jurisdiction, security for costs cannot be given unless in particular

(a) 5 B. & C. 208.

(b) 6 T. R. 507.

circumstances. That section confers the jurisdiction, but leaves it to be exercised by the Court. Surely it is a fair test, in dealing with these applications, to see what the Courts were in the habit of doing, where the defendant had a *prima facie* right to security for costs; and, where the application was not made at the proper stage, they did not give security, because it would be an encouragement to dilatory motions, made not to indemnify the defendant, but to frustrate existing proceedings.

There never was a case in which such an application was granted at this stage of the proceedings; and we must, therefore, refuse the motion, with costs.

H. T. 1860.

Eschequer.

MAGEE

v.

MARK.

BELL v. PARKE.

Jan. 21, 24,
25.

SLANDER.—The first paragraph of the summons and plaint complained that the defendant, in a certain "conversation which he "had, of and concerning the plaintiff, in the presence and hearing "of divers persons, falsely and maliciously spoke and published, "of and concerning the plaintiff, the following scandalous and defamatory words; that is to say, 'Only that I (meaning him the "defendant) do not wish that my name (meaning the name of him

To an action for oral slander the defendant pleaded that before, &c., plaintiff and defendant were brother officers, and defendant was interested in the good character of plaintiff, and that

no officer of the regiment should be guilty or suspected of any crime, "and that it was the duty of the defendant to mention to the adjutant of the regiment the existence of any such imputation upon the character or conduct of the plaintiff, as such brother officer; in order that the said imputation might be inquired into," and, if found to be false, removed. That before, &c., the plaintiff had been placed under arrest, upon a charge prejudicial to his character, and that directions were given, according to the Articles of War, and entered in the regimental order book, for holding a court-martial to investigate said charge; that all said facts were matters of notoriety in the regiment; that, at the time of the speaking, &c., the day for the court-martial had not arrived, and plaintiff was under arrest; and "that, under the circumstances aforesaid, the defendant entered into conversation with Ensign Dunne," the adjutant, at the said barracks, concerning all said matters; that, before said conversation, it had been reported to defendant, which defendant believed to be true, that plaintiff had committed the offence imputed by the alleged slander; and "defendant, in the course of the said conversation, mentioned to the said Ensign Dunne, the adjutant, the said matter so reported;" and, in so doing, spoke and published the words, &c., in good faith, and without malice, and believing same to be true.—*Held* (PROOT, C. B., *dubitante*), that the facts stated in the plea did not show the communication to be privileged.

H. T. 1860. “the defendant) should be brought in question, I (meaning the
Eschequer. “the defendant) would have it proved that he (meaning the
 BELL “tiff) attempted to purloin a gold chain from a house in De
 v. “(meaning thereby and giving it to be understood that he
 PARKE. “plaintiff had been guilty of an indictable offence, to wit, of
 “attempting to steal said gold chain).”

Second defence to the first paragraph :—“At and previous
 “the time of the speaking and publishing of the words in the
 “paragraph alleged, the plaintiff and defendant were brother officers
 “in the same regiment, that is to say, in Her Majesty’s 55th
 “regiment of foot, then stationed at Richmond-barracks, near Deptford
 “and defendant was interested in the good character and conduct
 “of the plaintiff, as a brother officer in the same regiment;
 “the defendant was further interested in this, to wit, that no officer
 “of the said regiment, and with whom the defendant was in
 “association, should be guilty of, or suspected of being guilty of,
 “any crime punishable by law, or of any act disgraceful to his
 “character; and that it was the duty of the defendant to mention
 “to the adjutant of the regiment the existence of any such imputa-
 “tion upon the character or conduct of the plaintiff, as a
 “brother officer, in order that the said imputation might be inquired
 “into, and, if found to be false, it might be removed, and the
 “honour of the plaintiff and of the regiment should remain un-
 “affected; and the defendant saith that, shortly before the time
 “the speaking and publishing of the said words in the said para-
 “graph set forth, the plaintiff had been placed under military
 “arrest at the said barracks, for absenting himself from parade
 “and shortly after his discharge from the said arrest, and before
 “the speaking and publishing of the said words, the plaintiff was
 “again placed under military arrest at the said barracks, by order
 “of the then commanding officer of the said regiment, in conse-
 “quence of a certain complaint theretofore preferred and made to
 “the then commanding officer of the said regiment against the
 “plaintiff, concerning other matters imputed to the plaintiff, and
 “calculated to prejudice his good character and fair reputation;
 “aforesaid; and thereupon directions were duly given, according

the Articles of War, for the holding of a Court of Inquiry at the said barracks, on a certain day, for the purpose of investigating the matter of the said complaint. And defendant says that, before the time of the speaking and publishing of the said words, the said directions were duly entered in the regimental order book of the said regiment; and the fact of the plaintiff having been so arrested for absence from parade, and also the fact of such arrest of the plaintiff, upon the complaint so made as aforesaid, and also the directions so given for the holding of such Court of Inquiry, had become and were matters of notoriety in said regiment. And the defendant says that, at the time of the speaking and publishing of said words, the said day so appointed for the holding of the said Court of Inquiry had not yet arrived, and the plaintiff then was under the said arrest, in consequence of the complaint aforesaid. And the defendant says that, under the circumstances aforesaid, the defendant entered into conversation with ensign Dunne, then and there being the adjutant of the said regiment, at the said barracks, concerning such absence of the plaintiff from parade, and concerning the matter of the then subsisting arrest of the plaintiff, and concerning the character and conduct of the plaintiff, as aforesaid. And the defendant saith that, before the time of the said conversation, it had been reported to defendant, and defendant believed such report to be true, that the plaintiff had attempted to purloin a gold chain from a house in Dublin, and that the plaintiff had been guilty of the said indictable offence, in the said paragraph mentioned; and the said defendant, in the course of the said conversation, mentioned to the said ensign Dunne, the adjutant of said regiment, the said matter so reported to him, and in so doing spoke and published the words in the said paragraph mentioned; and the defendant saith that he spoke and published the same, being a privileged communication, and on a lawful occasion; and the defendant spoke and published the same in good faith, and without malice, and believing the said words to be true in substance and in fact.—Demurrer to this defence.

H. T. 1860.

Exchequer.BELL
v.

PARKE.

H. T. 1860.

Exchequer.

BELL

v.

PARKER.

W. Sidney, with *E. Sullivan*, in support of the demurrer.

The plea is bad, for it does not state facts from which the interest relied upon by the defendant could arise. It is settled since the Common Law Procedure Act of 1853, the defence of privilege must be specially pleaded; and all the facts necessary to be proved, in this country, upon the issue whether the defence is true in substance and in fact, and in England, upon the plea of not guilty, must be set out upon the record: *Dixon v. Frank*. *Pierce v. Ellis* (b). The mere averment, therefore, of duty to the defendant is not sufficient, unless facts to support it are stated. If the adjutant is not shown to have been the proper officer to receive the complaint, nor that he had authority to institute any inquiry. So in actions for breach of duty, the facts raising the duty must be set out, and it must be averred that by reason thereof it became the duty of the defendant, &c.: *Brown v. Mallett* (c); *Parsons v. Plunket* (d), *per* Lefroy, C. J.; *Seymour v. Maddox* (e).

Another objection to the plea is that it does not state that the words complained of were spoken in discharge of the duty, or with a view to an inquiry.

Again, there could have been no duty to speak the words at the occasion stated in the defence. The only averment is that "the defendant entered into conversation." A communication will not be privileged, if it is made at a dinner table, or in idle gossip: *Somerville v. Hawkins* (f); *Toogood v. Spyring* (g); *Edwards v. Scott* (h). It is stated that the defendant heard certain rumours, but it is not shown what they were, nor that the defendant believed them to be true.

Further, the words are charged by the plaintiff to have been spoken in the presence of several, and the plea only justifies the communication to one, and it does not conclude with a *quod eadem*.

(a) 7 Ir. Jur. 239.

(b) 6 Ir. Com. Law Rep. 35.

(c) 5 C. B. 599.

(d) 4 Ir. Jur., N. S., 202.

(e) 16 Q. B. 326.

(f) 10 C. B. 583.

(g) 1 Cr. M. & R. 181.

(h) 7 Ir. Com. Law Rep. 607.

Lastly, the slander is not justified in the sense imputed by the
 plaint : *Ruckley v. Kiernan* (a). H. T. 1860.
Eschequer.

BELL
 v.
 PARKER.

F. Macdonogh and *J. A. Philips*, contra.

According to the Articles of War, which are made public by the Mutiny Acts, it is the duty of an officer in any regiment, who is aware that a brother officer has committed any act unbecoming an officer and a gentleman, to mention it to the commanding officer. It is the interest of every officer that those Articles of War should be strictly enforced ; and they cannot be carried out, if an officer is not entitled to discuss with another any matter affecting the character and conduct of a brother officer. A communication is protected if made *bona fide* by a person having an interest or duty in the subject-matter of the communication to a person having a corresponding interest or duty : *Harrison v. Bush* (b). It is not necessary that the duty should be a legal one. The rule includes moral and social duties of imperfect obligation. Here the party making the communication was a brother officer of the plaintiff ; and it was made to the adjutant, who had a similar interest with the defendant in the subject-matter of the communication, and was also, in his official position, the proper person to hear the communication, and, if necessary, have it put in course of investigation. It is said that it does not appear by the plea that the adjutant had any authority to institute an inquiry ; it avers that it was the duty of the defendant to mention it to the adjutant, " in order that such imputation might be inquired into." Upon general demurrer, the plea, if ambiguous, must receive such a construction as will support it : *Ruckley v. Kiernan* ; and it is submitted that the duty of the defendant to communicate, and of the adjutant to hear the communication, sufficiently appear.

Again, it is contended that, as the communication was made in the course of a " conversation," it is not privileged. But a communication may be privileged, though made in the course of a casual conversation, if a duty existed to make it. Absence of pro-

(a) 7 Ir. Com. Law Rep. 79.

(b) 5 Ell. & Bl. 344.

H. T. 1860.

*Eschequer.*BELL
v.

PARKE.

priety in the mode and place of making it may be evidence upon the question of malice in fact, but does not take away the privilege, if the occasion confers it: *Cooke v. Wildes* (a). Was it necessary for the defendant to aver that the words spoken in the belief that he was discharging a duty, and with a view to an inquiry. If the duty existed, they will be presumed to have been spoken in discharge of the duty, unless malice is shown.

They cited *Farran v. Fles* (b); *Toogood v. Spring*; *Somerville v. Hawkins* (d); *O'Connor v. Wallen* (e); *Deane v. Jones* (f); *Wright v. Woodgate* (g); *Coxhead v. Richards* (h).

E. Sullivan, in reply.

The plea should show that the object of the defendant was to do that which it was his interest and duty to do, and that the words were spoken with a view to that interest and duty. Here, consistently with the language of the plea, the motive might have been malice. The conversation with the adjutant appears on the face of the plea to have been mere idle gossip, and to have been wholly disconnected with duty, and not commenced with a view to an inquiry: *Tuson v. Evans* (i); *Martin v. Strong*.

PIGOT, C. B.

The decision of the Court will be, that this pleading cannot be sustained as it now stands. But I wish to state what occurred to myself individually on the subject, because I feel considerable difficulty in adopting the conclusion at which my Brethren have arrived.

The reasons, however, which appear to me to sustain it are these:—

If two officers of a regiment meet, and one of them says words

(a) 5 Ell. & Bl. 328.

(c) 1 Cr., M. & R. 181.

(e) 6 Ir. Com. Law Rep. 378.

(g) 2 Cr., M. & R. 573.

(i) 12 Ad. & Ell. 773.

(b) 5 B. & Ald. 542.

(d) 10 C. B. 583.

(f) 4 Esp. 191.

(h) 2 C. B. 569.

(k) 5 Ad. & Ell. 535.

er, "I have learned that A B (a brother officer) has been guilty of an atrocious offence—I wish to consult you whether I should divulge it—whether I should speak of it to the commanding officer," I should be slow to say that that was not a matter in which these two parties had a common interest, or that they were not entitled to discuss, *bona fide*, the question, whether one of them, who had obtained the information of the subject of discussion, had it a duty to communicate it to the superior officer. This plea, however, makes no statement of that character. It must, in my judgment, be treated as resting the alleged privilege altogether upon the duty or power of the adjutant to put the subject-matter of the communication in course of inquiry, and upon the duty it is immaterial whether it was a military or social duty) in the defendant to communicate the matter to the adjutant, with a view to his exercising his judgment as to whether it should or should not be made the subject of inquiry. If that be the foundation of the defence, two things must be shown upon the face of it; viz., first, that there was authority in the adjutant to institute an inquiry, and that there was a corresponding duty in the defendant to make the communication, with a view to that inquiry; and, secondly, that the communication was *bona fide* made in reference to that authority of the adjutant, and that duty of the defendant.

On the first of these two matters, it would be for the Judge at the trial to determine whether the occasion conferred the privilege. Upon the second, it would be for the jury to determine, upon the evidence, whether the communication was made *bona fide*, or maliciously. In this defence, the existence of *bona fides* and the absence of malice are distinctly alleged; and what we have to determine is, whether the authority of the adjutant to inquire, and the duty of the defendant to communicate, are sufficiently alleged? and the words are shown to have been spoken on the occasion of performing that duty of the defendant. The main defect of this pleading appears to me to be that there is no statement showing what is the nature of the adjutant's office, or showing that he had any duty or authority to institute, or to procure to be

H. T. 1860.

Exchequer.

BELL
v.
PARKE.

H. T. 1860.

Eschequer.

BELL

v.

PARKER.

instituted, any inquiry by court-martial or otherwise, into the plaintiff's alleged misconduct. There is, however, this statement, and it is, as I understand the defence, the only averment disclosing any duty in the defendant:—"And that it was the duty of the defendant to mention to the adjutant of the regiment the existence of any such imputation upon the character or conduct of the plaintiff, as such brother officer, in order that such imputation might be inquired into, and, if found to be false, it might be removed, and the honour of the plaintiff, and of the regiment, should remain unaffected." The difficulty I find is in determining that there is not involved in that statement an allegation of authority in the adjutant, and of duty in the defendant, sufficient on general demurrer. We are not dealing with an objection to the pleading on the ground of uncertainty. That objection could only be made upon a motion to set it aside as embarrassing; and knowing, as I do, the extreme difficulty which sometimes exists in framing pleas of privilege, I am disposed not to deal too strictly with them, but to uphold the pleading, if it conveys, to an ordinary understanding, the existence and the performance of a duty, in the speaking of the slanderous words, which will support the defence on the ground of privilege.

If the statement to which I have referred *does* contain a sufficient allegation of duty in the defendant, then I confess that I should have no difficulty in holding that the words are shown to have been spoken on the occasion of the performance of that duty.

Suppose the defendant had alleged, in terms, that the adjutant was empowered to originate inquiry into the misconduct of the officer, and that he was the person to whom, at the time in question, any other officer ought to have made a complaint, with a view to an investigation, and had further alleged that the defendant, hearing of this act having been done by the plaintiff, communicated it to the adjutant, with the view that he should determine whether he would or would not become the promovant in an inquiry; and let us then test the rest of the plea, with reference to that relation between the adjutant and the defendant. The plea states that the

plaintiff was under arrest; that a charge had been made against him; that the day appointed for the holding of the court-martial had not arrived, and that a conversation did take place respecting this charge against the plaintiff, his arrest and his character and conduct between the defendant and the adjutant. That does appear to me to state enough to show that the words were spoken in the performance of the duty. The duty and its performance cannot depend upon the place where the parties met (which is not shown), or on the preceding conversation, which is not stated. The conversation may have occurred casually in its inception, and yet have occurred in a proper place for both parties to discuss the matter. Suppose that what did occur was this; that at the rooms of the adjutant, or of the defendant, or in the barrack-square, there was a casual meeting between the defendant and the adjutant, and that they began to speak upon the subject of the court-martial, and of the defendant's character; that the conversation continued, and that all the circumstances relative to the defendant were discussed; the fact of the arrest, the approach of the court-martial and the charge against him; and that, in the course of that conversation, which was sufficient to bring the attention of both parties to this particular matter, the defendant had made the communication in question. Assuming that it was sufficiently alleged that it was within the authority of the adjutant to inquire, and was the duty of the defendant to make the communication to the adjutant, and that the fact of his omission to make it would have been a breach of duty, ought we to hold that, because the meeting was casual, the communication was not made in pursuance of a duty, and that, whether the meeting took place in a club, or in the street, or in a private room, it was not within the province of the defendant to take the occasion thus presented, which may have been the earliest, to put the adjutant in possession of what he believed to be the facts? I own I should not be prepared so to determine. On the contrary I should hold, if the duty were sufficiently shown in the previous part of the pleading, that the communication made must be taken to have been made in compliance with the dictates of that duty, and that an occasion arose when the parties met, and

H. T. 1860.

Eschequer.

BELL,

v.

PAGE.

H. T. 1860. when all the circumstances were being discussed, for putting the
Eschequer. adjutant in possession of all the facts known to, or *bona fide* believed,
by the defendant.

BELL
v.
PARKER.

It is said that there should have been an averment that the defendant made the communication *with the intention* of performing the duty; but I am not aware that, in a plea of this kind, it is necessary to make such an averment. It appears to me that, if the duty exists, and the act done corresponds with the duty and is done upon an occasion calling for the exercise of the duty, a Judge, if the question arose under the general issue, according to the old forms, ought not to have speculated upon the motives which actuated the defendant, but to have held that the occasion warranted the speaking of the words, if no malice were shown, and to have left the question of malice to the jury, if the evidence warranted his so doing; and in dealing with a special plea of privilege, alleging that the speaking of the words was *bona fide* and without malice, the Court is, in my judgment, bound to treat the words as privileged, if the occasion warranted the speaking. Conversations of this kind may often occur where the evidence of duty is not present to the mind, but the speaker is impelled by a sense of propriety on which he does not pause to reflect, and which he refers to no special motive; and, nevertheless, if his conduct in speaking the words be within the occasion of interest or of duty which is capable of protecting, they will be privileged. These are the views which occur to me, in reference to this pleading. I do not entertain an opinion of the sufficiency of the averment of duty so strongly as to justify me in saying more than that I find a difficulty in determining the defence to be bad on that ground. My Brethren, however, are all of opinion that the demurrer ought to be allowed.

GREENE, B.

The ground upon which I rest my judgment is this:—I consider this plea substantially defective in two points; first, in the allegation of duty in the adjutant; and, secondly, because it fails to

connect the occasion upon which the words are stated to have been used with the duty.

H. T. 1860.
Eschequer.

BELL

v.

PARKE.

FITZGERALD, B.

I have only to add that, for the reasons which my Brother GREENE has stated, I concur in the opinion that the demurrer should be allowed.

HUGHES, B., concurred.

Demurrer allowed.

HAFFIELD v. MACKENZIE.

Jan. 23.
E. T. 1860.
April 19.

THIS was an action brought by a surgeon, to recover a sum of £137, claimed to be due from the defendant, for professional services rendered by the plaintiff, in the months of March and April 1859. At the trial, before GREENE, B., in the Consolidated Nisi Prius Court, the plaintiff proved the rendering of the services, and produced witnesses to prove that the charges made were reasonable. He then closed his case. The defendant's Counsel then called for a nonsuit, or a direction, on the ground that the plaintiff had not proved that he was registered under the 21 & 22 Vic., c. 90, the Medical Act. Evidence of registration was then tendered on behalf of the plaintiff, and received by the learned Judge, subject to the objection of the defendant's Counsel. The registry-book kept under the 21 & 22 Vic., c. 90, was then produced from the custody of the Registrar, by which it appeared that the plaintiff had been duly registered under the Act, on the 3rd of May 1859, subsequently to the rendering of the services for which he sued, but before the bringing of the present action. The plaintiff having again closed his case, the defendant's Counsel called for a nonsuit, or a direction,

The proof of registration required by the 32nd section of the Medical Act (21 & 22 Vic., c. 90), by which medical men are precluded from recovering for professional services, without proof of registry, is proof that the plaintiff is registered at the time he tenders such proof in evidence.

H. T. 1860. *Erchequer.*
 HAFFIELD
 v.
 MACKENZIE. upon the ground that the plaintiff was not registered at the time when the professional services for which he sued were rendered, and that, under the Act, he was precluded from recovering for services rendered prior to registration. His Lordship refused to withdraw the case from the jury, but reserved leave for the defendant to move to have a nonsuit or a verdict for him entered, in case the Court above should be of opinion that he ought to have so directed. The jury having found a verdict for the plaintiff, *J. Clarke*, in Michaelmas Term, obtained a conditional order to enter a nonsuit, or a verdict for the defendant, pursuant to the leave reserved.

R. Armstrong (with him *T. A. Purcell*) now showed cause.

The first question is, whether the evidence of registration given by the plaintiff at the trial was sufficient? The 32nd section of the 21 & 22 Vic., c. 90, enacts that, "After the 1st day of January 1859, no person shall be entitled to recover any charge in any Court of Law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove, upon the trial, that he is registered under this Act." We submit that the proof given by the plaintiff was sufficient, within this section. The work was done in March and April 1859; and the plaintiff was registered in May 1859. He was therefore registered at the time when the Act renders the proof necessary, viz., "at the trial." Even if it could be contended that the registration should be before action brought, that condition also had been complied with. To sustain the defendant's argument, the words in the 32nd section, "that he is registered under this Act," must be read "that he was registered under this Act at the time when the business was done." The plaintiff admittedly had the qualifications which would entitle him to be registered. He had a right to practise before registration, for the statute contains no prohibitory words; and he had a Common Law right to maintain an action for his professional services, which the statute, as we submit, qualifies in one respect only, that he should, "at the trial," prove that he was *then* registered. The great policy of the Act, which was to prevent

unqualified persons practising, is satisfied by adopting the plaintiff's argument. The Act came into force on the 1st of October 1858; and there could be no publication of a registry until the 1st of January 1859; so that, according to the defendant's argument, everyone would be disqualified from practising between the 1st of October 1858 and 1st of January 1859. Secondly; we submit that it is not open to the defendant, on the pleadings, to make this objection. The want of registry is not pleaded, which, since the Common Law Procedure Act, it should be, to entitle the defendant to rely on it. The plaintiff is only bound to make a *prima facie* case; and it is for the defendant to show the grounds upon which he defends the action. Here the defendant, by merely traversing the doing of the work, admits the plaintiff was a surgeon.

H. T. 1860.
Eschequer.
 HAFFIELD
 v.
 MACKENZIE.

J. Clarke and E. Jordan, contra.

The plaintiff was bound to show, as a condition precedent to his recovering in the action, that he was registered under the Act at the time when the work was done for which he sued. The preamble of the statute is, "Whereas it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners." How could the patient know that he was attended by a qualified person, unless the medical man was registered at the time? It is said that, as the list is to be published only on the 1st of January in every year, the public in the meantime could not know who was registered; but the Act provides for local registries, in which a practitioner may get himself registered the moment he acquires a qualification; and these are made evidence of the fact and time of registration. The date of the registry is to be stated in the certificate (section 25); and that date is to be inserted in the general registry. There would be no object in having the date stated, if it were not to prevent an unregistered person practising. That was the policy of the Act. According to the argument upon the other side, an utterly unqualified person may practice, and recover for his services, provided he obtains a qualification, and gets himself registered the day before the bringing of the action. Secondly; the registry was a matter which it lay

H. T. 1860. upon the plaintiff to prove, as a condition precedent to his recovering in the action. It was a matter peculiarly within the plaintiff's knowledge. He might be registered in one of the local registries in England, Ireland or Scotland, to which the defendant could not have access. The decisions upon an Act *in pari materia*, the Apothecaries' Act, 55 G. 3, c. 194 (*Eng.*), show that this is a matter to be proved by the plaintiff, without regard to the defendant's pleading: *Morgan v. Ruddock* (a); *Shearwood v. Hay* (b); *Robinson v. Roland* (c). The Medical Act, passed after the Common Law Procedure Act, adopts substantially the language of the Apothecaries' Act; and we must assume that the Legislature intended to make the proof of registration in every case a part of the plaintiff's case.

T. A. Purcell, in reply.

The plaintiff, when the Act passed, was a qualified practitioner, and had a vested right at Common Law to recover for his professional services. The 31st section enacts that every person registered under the Act shall be entitled, according to his qualification, to practise medicine and surgery, and to recover reasonable charges for professional services rendered. That is an enabling, and not a restrictive section. The plaintiff, after the passing of the Act, was still at liberty to practise, according to his qualification, and to recover for his services, provided he complied with the sole condition imposed upon him by the 32nd section, namely, proved a registry, at the trial. The registration is an essential part of his proof; but it is not an essential element of his qualification, according to which he might practise and recover, as before the Act. The date of registration, therefore, is wholly immaterial.

Cur. ad. vult.

E. T. 1860. The judgment of the Court was delivered by PIGOT, C. B.
April 19.

This was an action brought by a surgeon, to recover his fees for professional attendance on the defendant. At the trial, before my Brother GREENE, the plaintiff proved that he was a licentiate of the

(a) 4 Dowl. P. C. 311.

(b) 5 Ad. & Ell. 383.

(c) 6 Dowl. P. C. 271.

College of Surgeons, and that he had rendered the defendant certain services, for which he sued in this action, and then closed his case. The defendant's Counsel called for a nonsuit, on the ground that the plaintiff had not proved that he was registered under the 21 & 22 Vic., c. 90. My Brother GREENE (properly, in our opinion) allowed the plaintiff to re-open his case, and to prove that he was so registered. But it appeared that the registry was in May 1855, subsequent to all the services which had been so proved. The defendant's Counsel then called on the learned Judge to direct a nonsuit, or a verdict for the defendant, on the ground that, by the statute, the plaintiff was precluded from recovering for professional services rendered before the registry. This my Brother GREENE refused to do. Some evidence was then given on the part of the defendant, chiefly (I believe) to reduce the demand; and at the close of the case the defendant's Counsel repeated the requisition which he had before made. My Brother GREENE refused to comply; but reserved leave to the defendant to move to have a nonsuit, or a verdict for the defendant, entered, if the Court should be of opinion that this ought to have been directed at the trial. Subject to that reservation the plaintiff obtained a verdict. A conditional order was obtained to enter a nonsuit, or a verdict for the defendant, pursuant to the leave reserved; and the case was argued before us on the showing of cause against that conditional order.

It was contended, on the part of the plaintiff, that, as the defendant did not, by a defence, plead the non-registry, and as there was, therefore, no issue on which the jury could affirm or deny that the plaintiff was registered, it was not open to the defendant to object to the non-registry at the trial. The defendant's Counsel, on the other hand, insisted that, notwithstanding the form of our proceedings under the Common Law Procedure Act, the principle of the decisions made in England upon the Apothecaries' Act, 55 G. 3, c. 194, ss. 14, 20, 21, applied; and that the plaintiff must fail, although the defendant did not plead the non-registry: *Morgan v. Ruddock* (a); *Shearwood v. Hay* (b), followed (with consi-

E. T. 1860.
Eschequer.
HAFFIELD
v.
MACKENZIE.

(a) 4 Dowl. P. C. 311.

(b) 5 Ad. & Ell. 383.

E. T. 1860. derable doubt) by the Court of Exchequer in *Sharpe v. Wag-*
Eschequer. *staff(a).*

HAYFIELD
 v.

MACKENZIE.

It is unnecessary to consider the application of these authorities, because we are all of opinion that proof of a registry sufficient to maintain the action (on the assumption that it was open to the plaintiff to make the objection in the present state of the pleadings) was given at the trial. It is admitted that there is no provision in the 21 & 22 *Vic.*, c. 90, which, in terms, prohibits an unregistered surgeon from practising, or from recovering fees for professional services rendered before registry. The only disabling section, in reference to the recovery of fees, is the 32nd. By that section it is enacted that—"After the 1st day of January 1859, no person "shall be entitled to recover any charge, in any Court of Law, for "any medical or surgical advice, attendance, or for the performance "of any operation, or for any medicine which he shall have both "prescribed and supplied, unless he shall *prove upon the trial* that "he *is registered* under this Act." Upon the context of this section alone, it clearly requires nothing more than that, upon the trial, the plaintiff shall prove that he *is* registered. The present tense is used. It is used in connection with the time when the proof is required. That time is the time of the trial. If we hold that the Act requires a registration prior to the trial, we must substitute the past for the present, and read "*is*" "*was*." But that will not be enough to make the legislation intelligible. The present time is a single point of duration, but the past comprises many periods; and if we read the word as if it was in the past tense, we make the enactment wholly indefinite and uncertain, unless we superadd other words. We must, then, further determine this question, namely, *when*, before the trial, does the statute require the registry to have been effected, as a condition for recovering in the action? Shall we decide that the registry must be "before the bringing of the action" or "before the rendering of the service?" On this the statute is silent; and we have no index whatever to guide us, except our own conjecture as to what the Legislature would probably have done if they were asked to frame an enact-

(a) 6 Dowl. 566.; S. C., 3 M. & W. 521.

ment. It is impossible that we can so interpret this section, without assuming the power of legislating, in the form and under the pretence of expounding. We have no authority to change the language of the Legislature, and introduce into the statute words which the Legislature have chosen to withhold. If there were something in other parts of the statute repugnant to the plain and ordinary meaning of the words of the 32nd section, but consistent with a less obvious meaning of which those words were susceptible, we might reject the former, and adopt the latter, in order to make the whole legislation consistent. So, if the ordinary meaning of the words would involve some absurdity, and they were capable of a reasonable interpretation, we ought to adopt what would be reasonable, in preference to what would be absurd. But absurdity in these words, in their ordinary sense, there is none. On the contrary, it was not unreasonable, and may have been very wise, in the Legislature, to abstain from prohibitions and penalties which might have made the statute odious, and to select, as sufficient for their purpose of encouraging and inducing medical men to register, the lesser, in preference to the larger and harsher disability. And even if the words of this section were, by any construction of them, however forced, capable of such a meaning as that for which the defendant's Counsel have contended, namely, that the plaintiff should be registered before rendering the service for which he sues, there is nothing in the previous or subsequent parts of the statute which requires that construction, by presenting anything inconsistent with the plain and ordinary signification of the words, namely, that the plaintiff shall prove, upon the trial, that he *is* (that is, at the time of so proving) registered. The preamble of the statute recites that "it is expedient that persons requiring medical aid should be enabled to distinguish qualified from unqualified practitioners." A variety of provisions are then made, for the registry of qualified medical men; for the annual publication of the registry; for the appointment of a general and of local medical councils; for inquiry into the course of medical instruction and examination prevailing in certain colleges and bodies, and for inducing those bodies

E. T. 1860.

Exchequer.

HAFFIELD

v.

MACKENZIE.

E. T. 1860.

Eschequer.

HAFFIELD

v.

MACKENZIE.

to improve such course of instruction and examination, if necessary, by withholding the privilege of registration from those on whom they should confer medical qualifications, until the requisite improvements should be made. The statute then, by the 31st section, enables every person registered under the Act to practise, and to recover charges for professional services, or for medicine supplied, in any part of her Majesty's dominions. I concur in Mr. *Purcell's* argument, that this is an enabling, and not a disabling or restrictive, section. It removes (on the condition of registry as the price of the immunity) local restrictions prevailing under the existing law. For instance it was held, in *Collins v. Carnegie* (a), that "a person created a doctor by a Scotch university" is not entitled to practise in England, unless he be licensed by the College of Physicians. The same section enables registered physicians to recover their fees, if the College of Physicians to which they belong do not, by a bye-law, decline that advantage. The 36th section prevents unregistered persons from holding any of the public appointments mentioned in that section. The 37th section provides that "no certificate required by any Act," "from any physician," &c., shall be valid unless the person signing it be registered under this statute. And the 32nd section, without (as I read it) taking away the right to practise, or the right to sue for fees, previously existing by law, imposes *this* restraint upon unregistered persons, and provides *this* stimulant to their registry, viz., that *at the trial* of an action for their fees, they must prove, as part of the procedure at the trial, that they are registered.

All those provisions tend greatly to encourage medical men to registry. The framers of the Act were probably conscious that, if they had proposed more stringent provisions, the measure would not have received the sanction of the Legislature. Nothing could have been easier than for the Legislature, if they had so designed, to prohibit unregistered persons from practising, or to impose penalties on those for practising, or to disable them for recovering for services rendered while they were unregistered. The

(a) 1 Ad. & Ell. 695; S. C., 3 N. & M. 703.

Legislature had a precedent for so doing in the Act for the regulation of Apothecaries, 55 G. 3, c. 194, ss. 14, 20 and 21. By so doing, they might have applied more stringent means of advancing the purpose disclosed in the preamble of the Act. But they have not done so; and we cannot hold that they intended what they have abstained from expressing. We are not at liberty to strain, beyond their natural meaning, clear words, which in that meaning are not inconsistent with anything else in the statute, and in their ordinary sense do not involve anything absurd or unreasonable, for the purposes of advancing what we may suppose to be the object of the Legislature. That mode of expounding statutes, if it ever did (as I fear it sometimes did) receive sanction from former Judges, must be considered as now exploded. It was said, by a living Judge of the very highest authority, Lord Wensleydale, in *Grey v. Pearson* (a), "I have been long and deeply impressed with the "wisdom of the rule, now, I believe, universally adopted, at least "in the Courts of Law in Westminster Hall, that in construing "wills, and indeed statutes, and all written instruments, the "grammatical and ordinary sense of the words is to be adhered "to, unless that would lead to some absurdity, or repugnance, "or inconsistency with the rest of the instrument; in which case "the grammatical and ordinary sense of the words may be modified "so as to avoid that absurdity and inconsistency; but no farther. "This is laid down by Mr. Justice Burton, in a very excellent "opinion, which is to be found in the case of *Warburton v. Loveland*." In this passage of Lord Wensleydale's judgment, he adopts the very terms used by Mr. Justice Burton, in *Warburton v. Loveland* (b). The same principle of construction, applied to Acts of Parliament, had been long before laid down by Lord Wensleydale in the Court of Exchequer, in *Becke v. Smith* (c). It was also stated, in *Miller v. Salomons* (d), by Baron Martin, who expressly adopted the passage referred to in Mr. Justice Burton's judgment in *Warburton v. Loveland*. Besides the authorities cited in *Dwar-*

E. T. 1860.
Exchequer.
HAFFIELD
v.
MACKENZIE.

(a) 6 H. L. Cas. 106.

(b) 1 H. & Br. 648.

(c) 2 M. & W. 195.

(d) 7 Exch. 527, 528.

E. T. 1860. *vis on Statutes*, pp. 579, 583, 584, 587, 588, 595, 597, 598, I may
Eschequer.
HAFIELD
v.
MACKENZIE. further mention the following recent instances in which similar
views have been expressed by some of our most eminent Judges:—
Lord Chief Justice Tindal, *Sussex Peerage Case* (a); Lord
Brougham, *Fordyce v. Bridges* (b); Lord Langdale, *Logan v.*
Earl of Courtown (c).

We are all of opinion that the verdict must stand, and that the
cause shown must be allowed.

(a) 11 Cl. & Fin. 143.

(b) 1 H. L. Cas. 4.

(c) 13 Beav. 29.

E. T. 1859.
Queen's Bench

THE QUEEN, at the relation of JOHN LYONS,

v.

JOHN FINNEGAN.*

(*Queen's Bench*).

April 18, 29.

QUO WARRANTO.—In Hilary Term 1859, a conditional order was obtained for exhibiting an information in the nature of a *quo warranto* against John Finnegan, to show by what authority he claimed to be a Councillor of the borough of Sligo; on the grounds, first—That no vacancy in the office Councillor existed in the borough at the time of the election of Finnegan. Secondly.—That M. Connolly, in whose place Finnegan claimed to have been elected, had been duly elected to the office of Councillor, and possessed the requisite qualifications. Thirdly.—That M. Connolly, not having complied with the requirements of the 3 & 4 *Vic.* c. 108, and not being within the exemptions mentioned in the 86th, 87th and 88th sections, was not entitled to resign the office of Councillor. Fourthly.—That the office was not effectually vacant, inasmuch as, even if such resignation was legal, yet the vacancy was not duly declared. Fifthly.—That Finnegan's election was improperly or fraudulently procured.

Affidavits were made by John Lyons, the relator, in support of the order, and by the Mayor, the Town-clerk, the defendant and M. Connolly, as cause against the order; from which it appeared that the borough of Sligo was divided into three wards, the North, East and West ward, and was governed and regulated pursuant to the 3 & 4 *Vic.*, c. 108. That the defendant was an inhabitant house-

A, being duly qualified, was elected a Councillor for a borough, under the 3 & 4 *Vic.*, c. 108, and made the requisite declaration of his qualification, and of his acceptance of the office; but, before the expiration of three years from the date of his election, A, having, as was alleged by affidavit, given up the premises in respect of which he was qualified, and believing himself to be therefore disqualified, gave notice to the Town-clerk that he had resigned the office of Councillor; and a notice was thereupon posted, by order of the Mayor, announcing the vacancy, and

that an election would be held on the third day afterwards, to fill up the office. At the election so held, B was elected Councillor.

The Court, under these circumstances, granted a *quo warranto*, calling upon B to show by what authority he claimed to exercise the office of Councillor.

* O'BRIEN, J., *absente*.

E. T. 1859.
Queen's Bench
 THE QUEEN
 v.
 FINNEGAN.

holder resident in, and a duly qualified burgess of, the borough. That M. Connolly had been duly elected a Councillor for the Eastern ward of the borough, on the 26th of November 1856, and had thereupon duly subscribed a declaration of his acceptance of office, and of his qualification (a). That, about the 1st of November 1858, M. Connolly gave up possession, and ceased to be tenant of the premises in respect of which he had so qualified. That, on the 22nd of November 1858, the Town-clerk received a notice in writing from Connolly, that he had resigned his office of Councillor, believing, as was alleged by his affidavit, that he would subject himself to a penalty if he continued to hold the office (b). That no entry of the alleged resignation was recorded in the minute book of the Council, according to the usual practice in the borough. That, on the same 22nd of November, the Town-clerk, by direction of the Mayor, posted on the Town-hall a notice that Connolly had resigned, and that an election for filling the extraordinary vacancy (c) would be held, on the 25th of November, then next, at the Court-house, which was the polling place of the borough. That the election was accordingly held before the Alderman and Assessors (d), on the 25th of November, and the defendant, being a candidate, was elected. It was also alleged, by the affidavit of the relator, that Connolly had not ceased to be qualified, from the time of his election up to the time of his notice of resignation, and was not exempt from his obligation to fill the office, pursuant to the 3 & 4 Vic., c. 108 (e), and that he had not paid, nor offered to pay, nor was he required to pay, at the time of his alleged resignation, a fine, pursuant to the 3 & 4 Vic., c. 108, s. 87. That no bye-laws had been made for the borough of Sligo, pursuant to the 3 & 4 Vic., c. 108, ss. 86, 87, 125. That, at an election for the office of Mayor of the borough, the defendant's vote was objected to, on the part of the relator, who was a candidate for the mayoralty; but the objection was overruled.

(a) 3 & 4 Vic., c. 108, s. 85.

(b) 3 & 4 Vic., c. 108, s. 89.

(c) 3 & 4 Vic., c. 108, s. 81.

(d) 3 & 4 Vic., c. 108, s. 64.

(e) ss. 58, 86, 87, 88.

Sir C. O'Loghlen (with him *M. Morris*) now showed cause.

E. T. 1859.

Queen's Bench

THE QUEEN

v.

FINNEGAN.

First.—No resignation by Connolly was necessary, because, by his ceasing to be qualified as a Councillor, a vacancy was, *ipso facto*, created, and it thereupon became the duty of the Mayor to provide that the extraordinary vacancy thus created should be duly filled up by a fresh election, pursuant to the 3 & 4 *Vic.*, c. 108, ss. 81, 89. The 58th section fixes the qualification which is necessary for a person "to be elected, or to be a Councillor." The words *to be* mean *to continue to be*; and when Connolly's qualification determined, he ceased to be a Councillor: *Regina v. Reynolds* (a). Secondly.—If resignation is necessary, Connolly duly resigned, and a vacancy in the Council was thereupon created. By the 87th section provision is made for the resignation of corporate offices, on payment of the fine which the person so resigning would have been liable to pay, on non-acceptance of the office. The amount of such fine is to be fixed by a bye-law, pursuant to the 86th section; but no such bye-law has been made in the borough of Sligo; and, therefore, no fine was payable by Connolly on his resignation. The default of the Corporation, in not duly making proper bye-laws, cannot deprive a person of his statutable right to resign a corporate office: *Staniland v. Hopkins* (b).—[LEFROY, C. J. In that case the party tendered the maximum amount of the fine to the person who would have been the proper person to receive it. If a man does everything in his power to entitle himself to the privilege of resigning, he is not to be debarred from resigning by the default of other persons. Here no fine was tendered, and no attempt was made to comply with the requirements of the statute].—No fine of any amount was payable, until fixed and ascertained by a bye-law, pursuant to the 86th section.—[LEFROY, C. J. A maximum fine is fixed by the statute, subject to be reduced by a bye-law].—Lastly.—The Court will exercise a discretion in granting the *quo warranto*: *Regina v. Parry* (c); and no substantial injury will be done by discharging the conditional order.

(a) 1 Ir. Com. Law Rep. 157.

(b) 9 M. & W. 178, 189.

(c) 6 Ad. & El. 810.

E. T. 1859. *Macdonogh* and *Hemphill*, contra.

Queen's Bench.

THE QUEEN
v.

FINNEGAN.

If there be any doubt as to the legal right of the defendant to fill the office, the Court will grant the *quo warranto*, in order to try that question. First.—Connolly was duly elected and duly qualified, and the fact of his losing one qualification does not, *per se*, vacate the office, he may be otherwise qualified, and his name is still on the burgess-roll: *Rowley v. Regina* (a). Secondly.—The resignation, which is relied upon by the other side, was not valid. No entry was made in the minute book of the Council, nor was any notification of the resignation made to the Council. The transaction as to the resignation was not *bona fide*. The rule of Common Law is stringent, in compelling the acceptance of offices for the public weal, and a mandamus will, if necessary, be granted for that purpose: *Regina v. Leyland* (b); *Regina v. Bower* (c). A person cannot defeat the *quo warranto* by resigning the office, after the conditional order has been obtained and before it is made absolute: *Regina v. Morton* (d); *Regina v. May* (e). *Staniland v. Hopkins* is distinguishable, because there the maximum fine was duly tendered. In the present case no attempt was made to comply with the statute; and it would be an evasion of the 86th and 87th sections of the Act, if it were held that, although a maximum fine is fixed by the Act, yet because a bye-law has not reduced the amount of the penalty, no penalty is payable. The effect of the bye-law is not to create the fine, it is merely to reduce the amount. This case is governed by the 58th, 86th and 87th sections of the statute; and before the Mayor had any power to act, an extraordinary vacancy must have been duly created, in the manner provided by the statute; but, in fact, there was no valid or legal vacancy, and the defendant has no title to fill the office of Councillor. *Quo warranto* is the proper way to try the question: *Regina v. White-well* (a); *Regina v. Phippen* (b). The exercise of the discretion

(a) 6 Q. B. 668.

(b) 3 M. & S. 184.

(c) 1 B. & C. 585.

(d) 4 Q. B. 146.

(e) 20 L. J., Q. B., 268.

(f) 7 Ad. & El. 960.

(g) 5 T. R. 85.

of the Court is to be governed by the principles of law, and this is a case which calls for the interference of the Court.

E. T. 1859.
Queen's Bench.
 THE QUEEN
 v.
 FINNEGAN.

M. Morris replied, and cited *Regina v. Anderson* (a).

Cur. ad. vult.

LEFROY, C. J.

This is a motion showing cause against a conditional order for a *quo warranto*, to ascertain whether the defendant Finnegan properly fills the office of Town-councillor for the borough of Sligo, which he claims to hold. The case has been argued as if the defendant had been elected to the office of Town-councillor, which was duly vacated by Connolly, in consequence of the loss of his qualification; but the real question is, was there a vacancy in the office at the time when the defendant was elected? If the office was not vacant, of course the defendant was not elected to it. In order to consider this question, we must first see what was the state of the office up to the time when the alleged vacancy occurred. It is admitted that Connolly was duly elected and qualified, as required by the statute, and that his qualification was duly registered. It is remarkable too, that the statute (b) requires that the party who is elected shall not only make a declaration for his qualification, but shall also state in his declaration that he accepts the office—an office which, in Connolly's case, could not be determined, by effluxion of time, in less than three years (c) from his election. It appears, therefore, by the records of the Corporation, that the office of Town-councillor was full while Connolly held it. Now, when a man accepts an office, he is bound to hold it and to discharge its duties during the term fixed by the law for the tenure of the office, unless, in due course of law, he is divested of the office. This Act of Parliament protects the subjects of the realm from the hardship of having these corporate offices imposed upon them if they labour under any of the disabilities enumerated in the Act (d), and in the 88th section makes provision that, in certain cases of disqualification, the Council shall

April 29.

(a) 2 G. & D. 113.

(b) 3 & 4 Vic., c. 108, s. 86.

(c) s. 61.

(d) s. 86.

E. T. 1859. declare the office to be void ; but, subject to these exemptions and
Queen's Bench. disqualifications, the Act is clear, " that every person duly qualified,
THE QUEEN " who shall be elected to the office of Alderman, Councillor, &c.,
v. " shall accept the office to which he shall have been so elected,
FINNEGAN. " or shall, in lieu thereof, pay " such fine, not exceeding £50, as
shall be fixed by a bye-law (a) ; and, by the 87th section, a person
so elected may, at any time, resign his office, on payment of the fine
which he would have been liable to pay for not accepting the office.
A question might possibly arise, upon the construction of these two
sections, whether, in case no bye-law is made, a person may at once
purchase off his liability, by paying the extreme fine of £50 ; but, in
the present case, there is neither tender nor payment of any fine,
and, therefore, this point does not now arise. It is said that
Connolly, on the 1st of November, gave up the premises in respect
of which he was qualified ; that, on the 22nd of November, he
gave notice to the Town-clerk that he had resigned, and thereupon,
by direction of the Mayor, the Town-clerk posted a notice of the
alleged resignation, and of an intended election to fill the vacancy,
and that, on the third day following, the election was held. Now,
without imputing anything as to the *bona fides* of this proceeding,
we do not find any provision in the statute which enables a Town-
councillor to effect a resignation of his office in that manner. But
further, this notice of resignation was given by Connolly only to the
Town-clerk ; no notice of a cesser of qualification was given to the
Council, nor was the fact investigated by the Council. It is con-
tended that this was an extraordinary vacancy (b), but the fact of a
vacancy was not ascertained, nor was the office declared to be
vacant. These are matters which the Court cannot try on affidavit,
and we must, therefore, disallow the cause shown, and make the
order absolute. The costs will abide the ultimate result.

(a) s. 86.

(b) s. 82.

E. T. 1859.
Queen's Bench

WILLIAM McCORMICK v. THOMAS BALLANTINE.

May 3.

DEMURRER.—First count: That at the time of the grievances, &c., the plaintiff was, and still is, the owner of and a carrier upon a certain Railway from the city of Londonderry to Coleraine; and is also the owner of the carriages, engines and vehicles thereon; and that a Railway train, composed of the said carriages of the plaintiff, is used, and of right ought to run daily, at the hour of five o'clock in the afternoon, from the terminus of said Railway at Londonderry aforesaid, to Coleraine aforesaid, for the conveyance of passengers and merchandise upon the said Railway; of which the defendant had notice. That, on the 23rd of October 1858, a train composed of the said carriages, and known as the five o'clock train, was, shortly before said hour of five o'clock in the afternoon, upon the said Railway, at the said terminus at Londonderry, as it legally might, and was being prepared to start with passengers and merchandise at the said hour, from the said terminus to Coleraine; of which the defendant had notice.—Averment; that the said train, and the carriages of which the same was composed, were necessarily and properly upon the said Railway as aforesaid; yet the defendant, well knowing the premises, but contriving, &c., caused a certain truck or waggon of the defendant to be drawn with great force and violence against the said train and the carriages of which the same was composed, and then and there broke to pieces, damaged and injured five of the said carriages. The plaintiff also contained a second count, in case, for negligence.

The first count of the plaintiff, which was in trespass, complained that the plaintiff being the owner of a certain Railway, and of the carriages, &c., thereon, which were necessarily and properly on the Railway, the defendant contriving, &c., caused a certain truck or waggon to be drawn with great force against the carriages, &c., and broke to pieces five of them. The second count was in case, for negligence. To the first count of the summons and plaint the defendant pleaded, that the said truck or waggon was put in motion by the servants of the defendant, in the usual and ordinary course of his trade and business,

and as he lawfully might, under and by virtue of the provisions of a certain indenture, dated, &c., made, &c., and otherwise upon a certain tramway that crossed the said Railway; and without any contrivance or intention to injure the plaintiff, on the part of the defendant or his servants, the truck or waggon struck against the carriages of the plaintiff, which were unnecessarily, and without proper care and notice to the defendant or his servants, and not necessarily and properly, as alleged, placed by the plaintiff or his servants on that part of the Railway at which the collision took place.—*Held*, upon demurrer, that this defence was no answer to the count in trespass, not being a traverse, or a plea in confession and avoidance of the injury complained of.

E. T. 1859.
Queen's Bench
M'CORMICK
v.
BALLANTINE.

Defence to the first count; that the said truck or waggon was put in motion by the servants of the defendant, in the usual and ordinary course of his trade and business, and as he lawfully might, under and by virtue of the provisions of a certain indenture, bearing date the 12th day of March 1852, made between this defendant of the first part, James Murray of the second part, and the Londonderry and Coleraine Railway Company of the third part; and otherwise upon a certain tramway that crossed the said Railway; and without contrivance or intention to injure the plaintiff, on the part of the defendant, or his servants, the said truck or waggon struck against the said train and carriages of the plaintiff, which were unnecessarily, and without proper care and notice to the defendant or his servants, and not necessarily and properly, as alleged, placed by the plaintiff or his servants on that part of the said Railway at which the said collision took place.

The second defence traversed the facts alleged in the second count.

The indenture referred to in the defendant's first defence was a deed whereby the land upon which the Railway was constructed was conveyed by the defendant Ballantine to the Londonderry and Coleraine Railway Company, and by which a right of way across said Railway, at all reasonable times, by means of a tramway for waggons, &c., was reserved to the defendant, whereby the means of communication between the defendant's stores and a quay erected by him on the river Foyle were afforded to the defendant. The plaintiff was lessee of the Railway from the Company.

Demurrer to the first defence, upon the following grounds:—Because, although it is admitted by the said defence that the said Railway is the property of the plaintiff, and that the defendant caused the said truck of the defendant to be driven against the carriages of the plaintiff, then being on his said Railway, as in the said count stated, yet it is not averred in the said defence that the defendant could not have avoided the said injury in said count complained of, by the exercise of reasonable and proper care; or that the said injury was inevitable; or that the alleged negligence of the plaintiff directly caused the said injury, or con-

tributed thereto; and because it is not averred in said defence that the defendant was not guilty of negligence; and because, though the said defence proposes to justify the putting in motion the said truck therein mentioned, under the indenture therein mentioned, by which said indenture a right of passage across said Railway, at all reasonable times, is reserved to the defendant, as by said indenture will appear, it is not averred that the time when said truck was so driven, as in said count mentioned, was a reasonable time for so doing; and because the plaintiff had a right to have his said carriages at the place in said count mentioned, at the time therein mentioned; and because it is admitted, in said defence, that the defendant directly caused the said injury, and no sufficient justification is shown for the same.

E. T. 1869.
Queen's Bench
M'CORMICK
v.
BALLAN-
TINE.

James P. Hamilton (with him *J. Brooke*), for the demurrer.

The act of the defendant, in running his truck against the plaintiff's carriages, being the direct cause of the injury, the plea does not show any defence, because it does not allege that the defendant used reasonable or proper care in putting the truck in motion, and that the injury was unavoidable. No material issue is tendered, by the plea; and, therefore, the plaintiff has been driven to demur. To constitute a proper defence to an action of trespass, the defendant must show that, in committing the injury complained of, he laboured under inevitable necessity: *Dickenson v. Watson* (a), the not showing which is the vice of this plea. From all that appears in it, the defendant might have avoided committing the injury complained of. Negligence on the part of the plaintiff will not disentitle him from bringing the action, unless that negligence be the direct cause of the injury: *Dowell v. The General Steam Navigation Company* (b).—[LEFROY, C. J. The demurrer relies upon the contents of a deed, which is not set out, and of which, from the record, the Court knows nothing].—Under the present system of pleading, it is only necessary to set out such parts of a deed or document as the party pleading it or relying

(a) T. Jones, 206.

(b) 5 El. & Bl. 195; S. C., 1 Jur., N. S., 800.

E. T. 1859.
Queen's Bench
M'CORMICK
v.
BALLAN-
TINE.

upon it may think material, and that incorporates it into the pleading: Common Law Procedure Act 1853, s. 63; and by section 64 the deed must be produced on the trial or argument of the case, unless its absence be satisfactorily accounted for. But the plea is bad upon general demurrer, for the reason first mentioned, without any reference to the deed at all.

D. M'Causland (with him Norman), contra.

The injury complained of is one for which either an action of trespass or on the case should have been brought. Before the Common Law Procedure Act 1853, that was the course the plaintiff must have taken; and that Act does not change the nature of the action, but only the mode of procedure. The plaintiff cannot succeed in both forms of action; for, if that in case be true, it is impossible that he can succeed in the trespass. Where the plaintiff complains that the defendant did not use reasonable and proper care, he does not allege any negligence on the part of the defendant. The defence here is, that the act complained of was committed by the defendant's servants, in the ordinary course of their trade, as they lawfully might. But, this being an action of trespass, the plaintiff must make it appear that the injury has been done immediately by the defendant. If it be mediately the act of his servants, then it cannot be said to be that of himself. If the defendant puts forward his defence in clear terms, that is now sufficient, under the Common Law Procedure Act 1853. *Huggitt v. Montgomery* (a) shows that this is in the nature of an action on the case. It is not necessary for the defendant to show that he has taken all reasonable care; that is admitted by the demurrer. The deed is properly set out in the defence, the parties being allowed now to set it out in Court, and by reference it is embodied in the defence. The plaintiff, by demurring, admits that he put his carriages upon the Railway improperly; and that disentitles him from recovering in this action: *Sharrod v. The London and North-Western Railway Company* (b). If the plaintiff has contributed to the accident by his own negligence, he cannot recover. Negligence on the part of the plaintiff is an

(a) 2 N. R. 446.

(b) 4 Exch. 580; S. C., 14 Jur. 23.

admissible defence, under the plea of "not guilty:" *Ellis v. The London and South-Western Railway Company* (a); *Tuff v. Warman* (b). It is suggested by the plaintiff that the defendant exceeded the powers given him by the deed. If that be so, the plaintiff should have replied the excess: *Harvey v. Brydges* (c). Every averment of the exercise of reasonable care is thrown upon a Railway Company: *Barrett v. Midland Railway Company* (d); *Doyle v. The Dublin and Drogheda Railway Company* (e).

E. T. 1859.
Queen's Bench.
M'CORMICK
v.
BALLANTINE.

J. Brooke, in reply.

The defendant does not aver that the injury was inevitable; that is most material in a defence in trespass. In trespass, if the defendant justify, his defence will be bad, unless he also confess and avoid: *Gibbon v. Pepper* (f), or show that the injury was inevitable, and caused by no negligence on his part: *Weaver v. Ward* (g). The act complained of here is a trespass, whatever the form of action may be. The defendant, having set the train in motion without due precaution, or giving any notice to the plaintiff, is clearly liable for the injury caused by his negligence and carelessness: *Bird v. Holbrook* (h). The proposition contended for by the other side, that, if the plaintiff be guilty of any negligence at all, his right of action is taken away, is not correct; the negligence which disentitles the plaintiff to recover must be the direct and proximate cause of the injury complained of: *Tuff v. Warman* (i); *Dowell v. The General Steam Navigation Company* (k).

LEFROY, C. J.

We are of opinion that this demurrer must be allowed. This is an action not of trespass only, but also, as is allowed by the present state of the law, on the case. The party who may now bring those

(a) 2 H. & N. 424; S. C., 3 Jur., N. S., 1008; 26 Law Jour., Ex., 349.

(b) 2 C. B., N. S., 740; S. C., 26 Law Jour., C. P., 263; in Error, 27 Law Jour. 322.

(c) 14 M. & W. 437.

(d) 1 Fost. & Fin. 361.

(e) 10 Ir. Jur. 256.

(f) 2 Salk. 637.

(g) Hob. 134.

(h) 4 Bing. 626.

(i) *Supra*.

(k) *Supra*.

R. T. 1859:
Queen's Bench
MCORMICK
 v.
BALLAN-
TINE.

two different actions together is, nevertheless, entitled to exact from his adversary such a defence to each of them as the law heretofore would have required; but the defendant may frame that defence, as he is entitled to do, in accordance with the provisions of this Act of Parliament. The rule to which I allude is, that the defendant must meet the plaintiff's plaint, or cause of action, by a traverse, or by confessing and avoiding it. Now, what was the rule of law formerly as to pleading to an action of trespass *vi et armis*, when the defendant did not traverse the cause of action by the plea of the general issue, but took upon him to justify the injury complained of? He was bound to admit the trespass expressly or impliedly, if he meant to rely upon a justification of it; if he did not, his pleading was bad. So, under this Act of Parliament, which requires that a party shall either traverse the complaint, or confess and avoid it, if he do not simply traverse, he is bound to confess and avoid. To confess what? the trespass *vi et armis*. Now, what is the defence here? It is a defence not admitting that a trespass has been committed, and that the same was justifiable; but it is a defence, in the first place, showing that what is charged as having been done designedly, intentionally and wilfully by the defendant—in fact was not done by him, but that it was the act of his servants, and, therefore, not his act, so as to make him a trespasser; and, in the next place, that the act complained of was not done wilfully. There exist matters in this pleading which may constitute a very good defence to an action on the case, but which constitute none to an action of trespass *vi et armis*. There is no defence, therefore, in accordance with the rules of pleading established by this Act of Parliament, which, so far as it has left us any portion of the former rules of pleading, founded on good sense and reason, we should gladly embrace, and feel desirous of upholding. Upon this ground, therefore, it struck me, from the very outset, that this was a bad plea, and open to demurrer.

PERRIN, J.

I concur in the opinion expressed by the LORD CHIEF JUSTICE, and I think that this is a bad plea. It is not my intention to go

through all the cases which have been cited on both sides, or to enter upon an examination of those fine and nice distinctions which formerly existed between actions of trespass and actions of trespass on the case, the late statute having abolished such distinctions. The plaintiff complains of a direct and violent injury done to his property.—[His Lordship here read the summons and plaint and the defence.]—This is certainly a very novel defence. The defendant avers that the act complained of was committed by his servants, not by himself; but it is only necessary to refer to the plain language of the defence itself, from which it appears as distinctly as if he had said it in so many words, that the defendant himself did the act complained of; for he says his servants did it in the ordinary course of his trade and business, as they lawfully might. Without, therefore, occupying more of the time of the Court, by going at length into this defence, I shall merely add that, in my opinion, this defence is bad, and that the demurrer should be allowed.

E. T. 1859.
Queen's Bench.

M'CORMICK
v.
BALLANTINE.

HAYES, J.

I quite concur in and adopt what has fallen from the other Members of the Court. I think it important that this case should not be decided upon technical rules, but upon the ground that the defence is substantially defective. Assuming everything upon the face of the defence, and of the deed referred to in it, to be perfectly true, yet all does not amount to an excuse for the defendant's conduct. The deed purports to be a conveyance by the defendant, of the land upon which this Railway is made, to the Railway Company, and a right of way is thereby reserved to Ballantine by the Company across the Railway, thus affording him a passage between his quay and his stores. The trespass complained of, viz., the breaking of the plaintiff's carriages, was committed on the land of the plaintiff. Now, assuming that the effect of this deed, as set out upon the face of the defence, is to give the defendant a right of way across the land of the plaintiff—and further than that it cannot be pushed—yet that gives him no right to run across the land of the plaintiff with his waggons, without any selection of time, place or opportunity, and regardless of all care or consequences. Suppose a person

E. T. 1859. *Queen's Bench*
M'CORMICK
v.
BALLAN-
TINE.

has a right of way across my field, and my cattle happen to be upon that way, could it be contended for a moment that he can, therefore, kill or injure my cattle with impunity? The defendant should have said that he used the road across the Railway with reasonable care. Instead of doing that, he says that the plaintiff's carriages were upon the Railway unnecessarily, and without proper cause. That, however, is no reason why the defendant should run into and break those carriages, while on the plaintiff's own land. He should have alleged that he had taken reasonable care, and that, notwithstanding, the collision could not be avoided; but that he has not done. This defence is, therefore, defective in substance, and the demurrer must be allowed.

THE QUEEN, at the relation of HENRY LYONS,

v.

JOHN M'CARTHY.*

May 30.

Information, in the nature of a *quo warranto*, will not be granted to try by what title a party exercises the office of Mayor of a borough, where the ground of such application is a defect in the title of those who have elected him Mayor.—
 [HAYES, J., *dissentiente*].

QUO WARRANTO.—*Macdonogh*, on the 7th of May 1859, obtained a conditional order that the said Henry Lyons should be at liberty to file an information, in the nature of a *quo warranto*, against the said John M'Carthy, to show by what authority he claimed to use and exercise the office of Mayor of the borough of Sligo; on the ground that the election of the said John M'Carthy, held on the 1st of December 1858, was irregular, illegal and void, inasmuch as he had not a majority of legal votes, and inasmuch as the vote of John Finnegan, who assumed to fill the office of Councillor of said borough, recorded for said John M'Carthy, was void, by reason of his not being in legal possession of said office when he so voted; and also on the ground that a colourable majority of votes was occasioned by the

* O'BRIEN, J., *absente*.

vote of the said John Finnegan, in favour of the said John M'Carthy, whereby the presiding officer, John M'Gowan, was apparently warranted in giving a casting vote in favour of said J. M'Carthy. It appeared from the affidavits, that the borough of Sligo is divided into three wards. That M. Connolly, who filled the office of Councillor for the Eastern ward, on the 21st of November 1858, resigned. That, upon the 25th of November 1858, the said John Finnegan was elected to the office of Councillor, in the room of the said M. Connolly. That, on the 1st of December 1858, an election was held for the office of Mayor of the said borough, the candidates being the said Henry Lyons and John M'Carthy. That twelve votes were recorded for each of them, but that the vote of the said John Finnegan was included in the twelve votes recorded for the said John M'Carthy, whereby the number of votes being equal, the presiding Alderman gave his casting vote in favour of the said John M'Carthy, who was thereupon duly elected Mayor of said borough. That, upon an application by the said Henry Lyons to the Court of Queen's Bench, for liberty to file an information in the nature of a *quo warranto*, to know by what authority the said John Finnegan claimed to exercise the office of Councillor of said borough, the Court granted such application, and adjudged that the resignation of the said Michael Connolly was not in accordance with the provisions of the 3 & 4 *Vis.*, c. 108, and that no vacancy had thereby been occasioned in the office of Councillor for said borough (a).

T. T. 1859.
Queen's Bench.
 THE QUEEN
 v.
 M'CARTHY.

D. Lynch (with him *Sir C. O'Loughlen* and *M. Morris*) now showed cause.

The fact of the prosecutor applying for an information in the nature of a *quo warranto* is an admission that M'Carthy is, *de facto*, in possession of the office, otherwise the *quo warranto* could not go against him. The law is now perfectly well settled, that the title of the electors cannot be tried, unless where there is no mode by which their title can be impeached, in the first instance; but the title of corporators must be impeached in another way: *The*

(a) *Ante*, p. 299.

T. T. 1859. *King v. Hughes* (a). All the acts of the person in office are validated by the 3 & 4 Vic., c. 108, s. 89.

Queen's Bench.

THE QUEEN

v.

M'CARTHY.

Macdonogh (with him *Hemphill*), contra.

The defendant's title is impeached, upon the ground that Connolly's resignation was invalid, and that Finnegan, having been substituted for him, was only colorably in office. M'Carthy is not Mayor at all, if Finnegan had no title to vote. In *The King v. Hughes* (b), the decision turned entirely upon the pleading. The dictum of Bayley, J., which would seem to favour the view taken by the other side, was not necessary for the decision of the case. *Grattan v. Lendrick* (c) shows that the title of electors may be questioned, and, in that case, they were members of a Corporation. —[LEFROY, C. J. But were not the parties who voted in that case guilty of conduct which may be said to have amounted to a judgment of ouster?]—Yes; and in this case we contend that there is that which amounts to a judgment of ouster: *Regina v. Finnegan* (d); *Rex v. Holden* (e). The cases of *The King v. Smith* (f), and *The King v. The Mayor of Monmouth* (g), turned altogether upon the construction of the charters by which the Corporations were constituted. If the Court does not grant the *quo warranto*, it will be, in fact, deciding that the title of the elected cannot be questioned, on account of any infirmity in the title of the electors. It will also have this effect, that as the Mayor, in the present instance, goes out of office in October next, if the *quo warranto* do not now issue, proceedings against the Mayor will be futile, as, before they could be made effective, the Mayor's year of office will have been completed. The prosecutor seeks an issue whether the present Mayor has been duly elected; and he must fail upon that issue unless he can show a judgment of ouster against Finnegan. The prosecutor only asks the Court to apply to this case the principle upon which they acted in the case of *Regina*

(a) 4 B. & Cr. 368.

(b) *Supra*.

(c) 2 H. & Br. 409.

(d) *Ante*, p. 299.

(e) 2 Str. 1109; S. C., And. 389.

(f) 5 M. & S. 271.

(g) 4 B. & Al. 496.

v. *Reynolds* (a) ; otherwise a door will be opened to every species of abuse in corporate elections, for persons may vote for a particular person for the office of Mayor, although they may not have a shadow of right to do so ; and before the *quo warranto*, impeaching their title, can be tried, the Mayor will have enjoyed his year of office, and thus be enabled to set the Court and a rival candidate at defiance. The case of *The King v. Mein* (b) was upon motion.—[LYNCH, J. Because there was no other way of deciding it.—LEFROY, C. J. Have you any case showing that, upon a question as to validity of the title of the elected, the title of the electors was allowed to be impeached ?]—There is no case in which the order which the prosecutor seeks has been refused. The proviso in section 89 of the 3 & 4 Vic., c. 108, which validates the acts of persons in office, validates only the acts of persons legally in office.

T. T. 1859.
Queen's Bench.
THE QUEEN
v.
M'CARTHY.

Sir C. O'Loghlen, in reply.

The title of the electors can never be questioned, when that of the elected is impeached ; and, in Corporation proceedings, it has never been done : *Symmers v. The King* (c), followed in *The King v. Mein* (d), which, in its turn, was followed in *The King v. Hughes* (e) ; *Haig Corp.*, p. 215. The 3 & 4 Vic., c. 108, s. 89, validates all acts done by persons *de facto* in office, although they may labour under a defect of qualification.

LEFROY, C. J.

It occurs to my mind that, if we made the conditional order for an information in the nature of a *quo warranto* absolute in this case, we should thereby enable the relator to do indirectly what the law will not allow him to do directly. If an issue were knit as to whether or not the Mayor had a good title to his office, the law would not allow the relator, at the trial, to impugn that title, on the ground of defect of title in those who voted for him. By making

(a) 1 Ir. Com. Law Rep. 142.

(b) 3 T. R. 596.

(c) 6 Cowp. 489.

(d) *Supra*.

(e) *Supra*.

T. T. 1859.
Queen's Bench.

THE QUEEN
v.

M'CARTHY.

this conditional order absolute, we should, therefore, be setting the relator in motion to no purpose, inasmuch as he would be precluded from entering upon the question of the validity of the title of the electors. My Brother PERRIN agrees with me, that the rule laid down by Bayley, J., in the case of *The King v. Hughes* (a), upon the authority of Lord Kenyon, in *Rex v. Mein* (b), and of Lord Mansfield, in *Rex v. Latham* (c), is one both of convenience and of justice; for why should the party who is elected, and may be ready to maintain *his own* title, be placed in the predicament of being answerable for every defect in the title of those who have elected him, and of which he neither knows, or has the means of knowing, anything? The only pretence that could be alleged was, that there was judgment of ouster against Finnegan. Upon that point the case of *The King v. Hughes* is express; that, however, does not appear to have been obtained. As my Brother HAYES entertains some doubt in this case, I think it right that it should be understood that we do not decide that there is no instance in which an information in the nature of a *quo warranto* may be granted as against a Mayor; but we decide this, and this only, that when the ground of the application for the information is a defect in the title of those who have elected the Mayor, in such case the Court of Queen's Bench is powerless, because, not only the rule of law to which I have adverted, but also the Act Parliament, whether it be for public convenience, or any other reason, says that whenever an attempt is made to affect the title of the elected, and that object is sought to be reached by impugning the title of the electors, that cannot be done. That is the only case before us, and upon that alone our present ruling rests. We are, therefore, of opinion that we should allow the cause shown with costs.

PERRIN, J., concurred.

HAYES, J.

In this case I confess I was anxious to have escaped from expressing any opinion different from that of the other Members of the Court; and I need not say that I do so with very great

(a) 4 B. & Cr. 368, 376.

(b) 3 T. Rep. 596.

(c) 3 Burr. 1485.

diffidence. But my mind is not convinced, and I think that this conditional order ought to be made absolute. If not, the effect will be, that the supervision of this Court over the election of Mayors of boroughs will be virtually annulled. Assuming the law, as laid down by Bayley, J., in the case of *The King v. Hughes*, to be unquestionable, this does not push us to shorten the time for proceedings, which is already sufficiently short. According to that case, all that is required is, that the party who has obtained the *quo warranto* should be able to substantiate his objection to the title of the party elected, by judgment of ouster against the electors; but I see no necessity that such judgment should in fact have been obtained when the party applies to this Court for the conditional or the absolute order. If the construction that has been put upon the proviso in section 89 of the 3 & 4 *Vic.*, c. 108, on the part of the defendant, be the right one, I cannot see how the necessity of applying for this order could ever arise. That construction amounts to this, that any number of persons in possession of the office of Town-councillor, though without a particle of title, may vote at the election of a person to fill the office of Mayor of a borough, and by this means carry the election; and it is said than an election so carried is validated by the proviso in section 89. I confess that, before I could be induced to bring my mind to adopt that construction, I should require to have the question raised in the most solemn way, and fully discussed, and not incidentally upon a motion like the present; especially as, I think, that proviso may bear this reasonable and fair construction, that persons *de facto* elected and acting in the ordinary discharge of their duty as Town-councillors should not have their acts questioned, and, perhaps, annulled, to the serious prejudice of the public. But I do not think it was ever intended by the Legislature that where proceedings should be instituted against those persons to deprive them of their office, upon the ground that they have no right to fill the office which they assume to fill, this Court should be deprived of the power of granting an information in the nature of a *quo warranto* to try their right to fill such office, and to turn them out of it, if that right should be found not to exist.

T. T. 1859.
Queen's Bench.
 THE QUEEN
 v.
 M'CARTHY.

Cause shown allowed with costs.

M. T. 1859.
Common Pleas.

sion of the said John Mealy, to hold the same to him the said John Mealy, his executors, administrators and assigns, for the term, &c., of twenty-eight years, thenceforth, &c. By virtue of which said demise, said John Mealy continued in possession of said forty-one acres of said lands of Moyglass, so demised to him, as he had previously held said lands and enjoyed said commonage. That said lease is still a good, valid and subsisting lease for the residue of the said term of twenty-eight years. That by indented deed, bearing date the 16th day of October 1858, and made between the said John Mealy, of the one part, and the defendants, of the other part, he the said John Mealy, being possessed of said lands and of said right of commonage as aforesaid, did, by said deed, under his hand and seal, &c., for the considerations, &c., demise, &c., unto the same defendants and others, all that part of Moyglass, containing seventeen acres plantation measure, as then in the possession of the said grantees, together with a right of commonage and turbary, for the use of the said farm, situate in the barony of Leitrim, and county of Galway, to hold the same to them, their executors and administrators, from the 1st of October, then next ensuing, for the term, time and space of eighteen years fully to be completed, &c. That said last mentioned seventeen acres formed a portion of the forty-one acres demised by said lease of 1st of July 1852, hereinbefore mentioned. That said defendants have ever since continued in possession of said part of said lands of Moyglass, so demised to them, and of houses thereon occupied by each of them respectively, and also continued to enjoy the common, by said lease granted to them, on the Mountain of Moyglass, by depasturing on said mountain their cattle, cows and oxen, being their own commonable cattle, *levant* and *couchant*, in and upon said last-mentioned lands; and, for the purpose of such enjoyment, entered into the said close, in said plaint mentioned, and called the Mountain of Moyglass, in order to turn and put, and did then and there turn and put, into and upon the same the said cattle, cows and oxen, in said plaint mentioned, being their own commonable cattle, *levant* and *couchant*, in and upon the said land, with the appurtenances, to use the said common of pasturage of the defendants, and then and with said cattle, cows and oxen, neces-

M. T. 1859.

Common Pleas.

O'HARE

v.

FAHY.

M. T. 1859.
Common Pleas.

O'HARE
 v.

FAHY.

sarily and unavoidably ate up and depastured the grass then growing and being; and because said close, before and at the time of committing the grievances complained of, had been and was wrongfully inclosed with the fences and walls in plaint mentioned, so that, without breaking down and prostrating same, the defendants could not use or enjoy the said common of pasture in and upon said close in so ample and beneficial a manner as they otherwise might and would have done, they, the said defendants, did throw down and prostrate the fences and walls aforesaid, doing no unnecessary damage to the plaintiff, as they lawfully might, for the cause aforesaid; which are the several grievances in said plaint complained of.

Demurrer.—That the said John Mealy could not grant to the defendants a right of common on said Mountain of Moyglass, for all their, the said defendants', commonable cattle, *levant* and *couchant*, in and upon the lands demised to them by the said John Mealy, as stated in said defence. That the said John Mealy had not acquired, by said indenture of the 10th day of July 1852, an unlimited right of common in and upon said Mountain of Moyglass, and that the defence was no justification of the grievances complained of.

M. Morris (with whom was *P. Blake*), in support of the demurrer.

The words of the lease of the forty-one acres are inappropriate to the purpose of creating an incorporeal right. They are too vague and indefinite. The words in the lease, "as now in the possession of the said John Mealy," are properly referable to the forty-one acres, and not to the right of commonage. But, even assuming that these words were capable of granting a right of common to Mealy, the lessor of the defendants, there is no substantive averment that Mealy acquired, under this lease, a right of commonage on the Mountain of Moyglass, appurtenant to the forty-one acres. All that the summons and plaint states is that, "by virtue of" "which said demise, said John Mealy entered and continued in" "possession of said forty-one acres of said lands of Moyglass, so" "demised, &c., to him, as he had previously held said lands, and" "enjoyed said commonage." That does not amount to a distinct averment of the fact.

Beytagh objected that the only point stated in the demurrer was, that Mealy had no right to grant an unlimited right of common, and that the objection now made could not, therefore, be raised.—[MONAHAN, C. J. If the demurrer had been taken upon the ground of the want of a distinct averment, that would be the proper subject-matter for an amendment.]—Mealy had no right to sub-demise this right of common amongst a number of squatters.—[MONAHAN, C. J. There are no words in the second lease to create a new right; but the question is, whether it was not competent for him to convey existing rights?—Whatever commonable right Mealy enjoyed was not appendant but appurtenant: *Coles v. Platt* (a); *Rolle v. Osborn* (b); *Drury v. Kent* (c).

M. T. 1859.
Common Pleas.
O'HARE
v.
FANEY.

Beytagh and *Fitzgibbon* (Serjeant), *contra*.

The lease of 1852 must be taken in the sense most strongly against the grantor. The words of the lease were quite large enough to pass this right, provided it existed, as a matter of fact, at the time of the granting of the lease, there being no unity of possession in the grantor. Common appurtenant will pass by the words "with the appurtenances." The grantor ought not to be permitted to defeat his own grant, in consequences of having used too large a term: *Sacheverell v. Porter* (d); *Cowlam v. Slaek* (e); *Pretty v. Butler* (f); *Doidge v. Carpenter* (g); *Whalley v. Thompson* (h); *Willis v. Ward* (i); *Cheesman v. Hardham* (k); *Benson v. Chester* (l); *Hall v. Barry* (m). The common in question was for the cattle of the lessee, *levant* and *couchant*: *Earl of Manchester v. Vale* (n); *Potter v. North* (o). Common appurtenant is apportionable: *Tyrringham's case* (p); *Wyat Wyld's case* (q); *Mosse's case* (r); *Co. Lit.*, p. 122 a; *Woolrych on Rights of Common*, p. 126

(a) Brown. & Goldes. 17.

(b) Hob. 25.

(c) Cro. Jac. 14.

(d) Cro. Car. 482.

(e) 15 East, 108.

(f) 2 Sid. 87.

(g) 6 M. & S. 47.

(h) 1 Bos. & Pul. 371.

(i) 2 Chit. Rep. 297.

(k) 1 B. & A. 706.

(l) 8 T. R. 396.

(m) H. & Jo. 688.

(n) 1 Saund. 27, note m.

(o) 1 Saund. 349, note b.

(p) 4 Rep. 38 a.

(q) 8 Rep. 78 b, 79 a.

(r) 13 Rep. 66.

M. T. 1859. The passage in *Hobart* is merely a *dictum*, the case before the Court being one of an entirely different nature, namely, a writ of *warrantia chartæ*. The passage in *Brownlow & Goldesborough* "*warrantia chartæ*" is unintelligible.

Common Pleas.
O'HARE
v.
FAHY.

P. Blake, in reply, cited 2 *Fitz. Ab.*, p. 180, n.

Cur. ad. vult.

MONAHAN, C. J.

Nov. 25.

This case comes before us on demurrer; the question being whether the defendants are entitled to common of pasture on the mountain of Moyglass, for their commonable cattle, *levant* and *couchant*, on about seventeen acres of the lands of Moyglass, which adjoin the mountain on which the right of commonage is claimed? According to our decisions in previous cases, we have felt ourselves at liberty to look at the leases and documents stated in the pleadings, and not merely to take their effect from the description given of them by the respective pleaders. Of course, so far as facts are concerned, we take them from the pleadings. It appears, from the defence pleaded by the defendants, that, previous to 1852, the plaintiff, O'Hare, was seised in fee-simple of the lands of Moyglass, and the adjoining mountain of Moyglass; and, being so seised, by indenture of lease, dated 10th of July 1852, he demised to John Mealy a portion of said lands, by the following description, that is to say, "All that and those that part of the lands of Moyglass, containing "forty-one acres, statute measure, be the same more or less, together "with a right of commonage and turbary for the use of the said "farm, as now in the possession of the said John Mealy, situate, "lying and being in the half-barony of Leitrim and county of "Galway, as by a map or terchart of said lands in the margin "hereof will appear, being part of the lands conveyed to the grantor "by a deed, dated 31st of October 1851, under the hand and seal "of the Commissioners for Sale of Incumbered Estates in Ireland, "and described in the schedule of tenancies annexed to said deed as "being held by John Mealy, under lease for thirty-one years from "1st of May 1848."

The defence, after setting forth this lease, contains a statement that, after the execution of that lease, the said John Mealy, by virtue thereof, continued in the possession of said forty-one acres of the lands of Moyglass, and in the enjoyment of said right of commonage and turbary on the mountain of Moyglass, in plaint mentioned, so demised and granted respectively to him, as he had previously held said land and enjoyed said commonage. The first question that arises is whether, under this lease of July 1852, John Mealy was entitled to any common of pasture on the mountain of Moyglass? It has been insisted by plaintiff's Counsel that the words "as now in the possession of the said John Mealy," in the lease of 1852, apply only to the farm of forty-one acres, and not to the commonage and turbary for the use of said farm; and therefore that the grant of the common and turbary is void for uncertainty, it not being stated where the common is to be taken; and that the lease of 1852 is to be read as a demise to John Mealy of forty-one acres of the lands of Moyglass, as now in his possession, and a right of commonage and turbary for the use thereof; and I think it tolerably clear that, if such were the true reading of the lease, the result would be as contended for by plaintiff's Counsel, as there would be nothing to show where the common is to be taken. But, as it is clear from the lease that it was intended that a right of commonage should be granted thereby, it is of course the duty of the Court, if, by any reasonable intendment, they can do so, to give it a construction that will carry out that intention, rather than one that will defeat it, by holding it void, as to the grant of common, for uncertainty. It appears, if not by direct and positive averment, at least by necessary intendment, that, at the time of the execution of the lease of 1852, the tenant Mealy was in the possession not only of the farm containing forty-one acres, but also of a right of commonage for the use of said farm on the adjoining mountain. This being so, when the demise is of the lands containing forty-one acres, together with a right of commonage and turbary for the use of said farm, as now in the possession of the said John Mealy, why should not we apply the words "as now in the possession of the said John Mealy" as well to the commonage as to the farm, and hold that the

M. T. 1859.

Common Pleas.

O'HARE

v.

FAHY.

M. T. 1859. lease gave him the farm, with the same commonage and turbary
Common Pleas. which he then enjoyed, for the use thereof? We have no
O'HARE doubt that such is the true construction of the lease in question;
v. and it appearing, from other portions of the pleadings that the
FAHY. commonage he was in possession of was for commonable cattle,
levant and couchant, on said farm of forty-one acres, we are of
 opinion that the lease of 1852 granted said commonage to John
 Mealy. The next question is, whether John Mealy has granted
 any portion of the right of common to the defendants? It appears
 that by indenture of lease, dated the 16th of October 1858, made
 between the said John Mealy, of the one part, the defendant John
 Fahy, and the other defendants and others, of the other part, he
 the said John Mealy demised to the said John Fahy and others
 seventeen acres of Moyglass, portion of the forty-one acres, by the
 following description:—"All that and those that part of the lands
 "of Moyglass, containing seventeen acres plantation measure, be the
 "same more or less, subject to a survey, and as now in the pos-
 "session of the said John Fahy and partners, together with a right
 "of commonage and turbary for the use of the said farm, to hold
 "the same to them, their executors and administrators, from the
 "1st of November then next, for a term of eighteen years." There
 can be no doubt that the commonage and turbary for the use of
 said farm, intended to be thereby granted, was a proportionate part
 of the commonage and turbary to which the lessor Mealy was
 entitled under the lease of 1852, as appurtenant to the forty-one
 acres thereby demised, same being the only right of common Mealy
 had any power or title to grant; and, therefore, the point principally
 argued before us was, whether Mealy, being under the lease of
 1852 possessed of forty-one acres, and a right of common in the
 adjoining mountain for cattle, *levant and couchant*, on said forty-
 one acres, could, by the under-lease of 1858, of a portion of the
 lands, and for a shorter term than he himself had in the forty-one
 acres, subdivide the right of common, and grant to the defendants
 a right of common for their cattle, *levant and couchant*, on the
 seventeen acres, retaining in himself a similar right of common
 as appurtenant to the residue of the forty-one acres? In order to
 answer this question satisfactorily, it will be necessary, in the first

instance, to ascertain the nature or quality of the right of common granted by the lease of 1852; assuming, as no doubt we must, that that deed is the origin of the title, as it is clear that, even if any right of common, as incident to the farm of forty-one acres, previously existed, it was destroyed by unity of title and possession in the plaintiff O'Hare, the owner in fee of the lands of Moyglass, and the mountain adjacent thereto. The grant being of a right of commonage for cattle, *levant* and *couchant*, on the farm of forty-one acres, it is clear that it must in some way be incident to that farm, at least to this extent, that the right of common could not be separated from the lands, as it could not be used by any cattle except those *levant* and *couchant* thereon; and it is clear that Mealy could not grant the lands to another, retaining in himself the right of common. It appears, from *Co. Lit.*, p. 121, that such a right of common is appurtenant to the lands. The passage is:—"Appurtenant may, in some cases, be created at this day, as, if a man at this day grant to a man and his heirs common in such a moor for his beasts, *levant* and *couchant*, upon his manor, by this grant, this common is appurtenant to the manor, and shall pass by a grant of the manor." This is a clear authority that the common granted by the lease of 1852 became appurtenant to the lands thereby demised; and in the same book (p. 122), it is distinctly laid down that, by an alienation of a portion of the lands to which such common is appurtenant, the common itself becomes apportioned. The passage is:—"The second kind of common is a common appurtenant for beasts not commonable, as goats and the like. If a man purchase part of the lands whence common appendant is to be had, the common shall be apportioned, because it is of common right; but not so of common appurtenant, or of any other common, of what nature soever; but both common appendant and appurtenant shall be apportioned by alienation of part of the lands to which the common is appendant or appurtenant." This doctrine, that common appurtenant is capable of being apportioned by an alienation of part of the land to which it is appurtenant, does not depend merely on the statement of text-books. In *Wyat Wyld's case* (a), to which we have been

M. T. 1859.
Common Pleas.

O'HARE
v.
FAHY.

(a) 8 Rep. 79.

M. T. 1859. referred, in an action of replevin, one of the parties claimed common
Common Pleas. appurtenant as incident to his farm. It appeared that the common
 O'HARE was originally granted for cattle, *levant* and *couchant*, upon a large
 v. tract of lands, and that the party now claiming the common was a
 FAHY. purchaser of only a portion of those lands; and the question was, whether the common was apportioned by the purchase of part?

The case was very fully considered, and it was decided that the purchaser of a portion of the lands was entitled to common for his cattle, *levant* and *couchant*, upon that portion; that it would be against the common weal that by an alienation of part of the lands the right should be lost. The last resolution in that case is, "If he who has such common, appurtenant to land, leases part of the land to another, the lessee shall have common for his beasts *levant* and *couchant*, on the part so leased to him." The last resolution exactly suits the present case. The only other case to which I think it necessary to refer is *Sacheverell v. Porter* (a). In that case, one Fulk of Peterborough, being seised in fee of a large waste, and the Prior and Convent of Stow being seised in fee of some adjoining lands in Stallington, Fulk, in the 2nd *Henry* 4, by deed indented, granted to the Prior and Convent, common of pasture for them and their tenants of the lands in Stallington, for their cattle, *levant* and *couchant*, upon the said lands. On the dissolution of the Convent, the lands became vested in the Crown, who granted the lands, with all commons and rights of commonage there-to belonging or enjoyed therewith, to Rowland Hill and his heirs. Rowland Hill, by feoffment, assigned thirty-three acres, portion of their lands in Stallington, to the defendant and his heirs, *cum pertinentiis*; and by reason of such grant, the defendant claimed common of pasture for his cattle, *levant* and *couchant*, upon said thirty-three acres; and whether he was so entitled was the only question in the case. In that case it was scarcely questioned that common appurtenant was capable of being apportioned; but it was contended, on the part of the plaintiff, that it did not pass by the words "*cum pertinentiis*." The Court, however, held, that it *did* pass by these words, and that defendant was entitled to com-

(a) Cro. Car. 482.

mon on the waste in question for his cattle, *levant and couchant* upon said thirty-three acres. On the authority of this case, I see no reason why we should not hold that the right of common claimed by the defendants would pass by the lease of 1858, under the general words "with the appurtenances therein contained," even if it did not contain the express grant of common to which I have already referred. As against these very clear authorities, the research of Mr. *Morris* has discovered, in a judgment of Chief Baron Hobart, in *Rolls v. Osborn* (a), where it seems to have reposed for centuries, without being cited in any reported case or text-book, a passage which, if it be correctly reported, would appear to show that the opinion of that learned Judge was at variance with what we are now about to decide. The passage is:—

"If a man have common appendant to forty acres, belonging unto twenty acres, if he sell ten of his acres, or buy part of the forty acres, the common may be divided and apportioned *pro rata*; but if it be a common appurtenant, because it is against common right, it is lost." Now if the words "it is lost" were intended to apply to both the previous cases, namely, the selling part of the twenty acres, as well as buying part of the forty acres, it would be laying down the law contrary to those cases I have referred to; but if, as is highly probable, it was intended to apply only to the case of buying part of the forty acres, it would be all right, and consistent with all the authorities on the subject. Be this as it may, it must be recollected that the whole passage is merely the *dictum* of Chief Baron Hobart, in one of his elaborate judgments, reported by himself; but which gives neither the argument of Counsel or the judgment of the other Members of the Court, in a case in which the question arose on a different subject, namely, a *warrantia charta*; the question being, whether a purchaser of a portion of the lands was entitled to the benefit of the *warrantia charta*, which was given with the entire; and in which it was held, that he was not so entitled. The only other authority referred to by the plaintiff's Counsel is a passage in a book which is difficult to know how to describe, whether as a volume of Reports or not.

M. T. 1859.
Common Pleas.

O'HARE
v.
FAHY.

(a) Hob. 25.

M. T. 1859. It is entitled "Special Observations and Resolutions of the *Common Pleas*.
O'HARE
v.
FAHY.

"Judges of the Common Pleas, on several actions on the case
"there depending. By *Brownlow & Goldesborough*." The case
cited is *Coles v. Platt*, p. 17 of that book. The report of the case
is as follows:—"Action on the case, brought for disturbing the
"plaintiff's common. The defendant pretends title to the common,
"by reason of common appurtenant to certain customary land, to
"part of which he conveys title to himself, but not to the whole;
"and the question was, whether it were common appurtenant or
"appendant? as, if appurtenant, it could not be divided." Now,
whether this is intended as a resolution of the Judges, or a moot of
Counsel, or what was ultimately decided in the case, I am perfectly
at a loss to discover. As far as we have any means of knowing,
neither this case, nor the *dictum* of Chief Baron Hobart, which I
have already referred to, have been cited or referred to in any text-
book or reported case, until they are now, I believe for the first
time, brought to light, by the industry and research of plaintiff's
Counsel. I need scarcely say that we do not think they have suffi-
cient reason or authority to support them, to justify us in deciding
contrary to the well considered cases to which I have referred. On
the whole, therefore, we are clearly of opinion that the defendants
are entitled to the common of pasture claimed by them, though, no
doubt, it may be more inconvenient to the plaintiff, Mr. O'Hare,
that the right is vested in several than if it were confined only to
one. The plaintiff's demurrer to defendants' defence must, there-
fore, be overruled.

H. T. 1860.
Common Pleas.

CLEARY v. CLEARY.

Jan. 21.

THIS was a motion to rescind an order made by Mr. Justice O'Brien, on the 2nd of December 1859, directing that the award in this case made between the parties should be taken off the file, for the purpose of being amended. The action was relative to a right of way and a water-course; and before the case came on for trial it was consented by the parties that the subject-matter of the action should be referred to arbitration. A reference was accordingly prepared, and the questions in dispute were thereby submitted to three arbitrators, and the question of the costs of the action were also referred, in the words following:—"And that the costs of said reference, and of the said action, whether any such should be paid, and, if any, whether same should be full or partial costs, should be in the discretion of the said J. M.," naming one of the arbitrators. The consent having been made a rule of Court, the arbitrators, by their award, bearing date the 2nd of July 1859, disposed of the questions referred to them; and after awarding £1 damages to the plaintiff, the award contained the following clause:—"I, the said J. M., do also award, adjudge and determine, of and concerning the matters so referred to me solely: I award, order and direct that the said defendant do and shall pay to the plaintiffs their costs of the said action, and of the aforesaid reference.—" Signed," &c.

The award was filed on the 6th day of July 1859.

When the case came before the officer for taxation, the defendant's solicitor objected that the plaintiffs were only entitled to half costs, inasmuch as the arbitrator had neither stated that they were

The Court will not remit for amendment an award which is not void upon the face of it; and, therefore, where in an action referred to arbitration, the reference having provided, "that the costs of said reference, and of the said action, whether any such should be paid, and, if any, whether same should be full or partial costs should be in the discretion of J. M." (one of the arbitrators); and the award as to the costs was as follows:—"I, the said J. M., do also award, adjudge and determine, of and concerning the matters so referred to me solely: I award, order and direct that the said defendant do and shall pay to the plaintiffs their costs of the said action, and of the aforesaid reference."—

Held (upon appeal from an order made by a Judge in Chamber, remitting the award to the arbitrator for amendment), that the award, not being void upon the face of it, should not be remitted to the arbitrator for amendment.

Held also, that the plaintiff was entitled, under the award, to his full costs, although the sum awarded as damages was only £1.

H. T. 1860.
Common Pleas.

CLEARY
v.
CLEARY.

to be paid *full* costs, in the words of the reference, nor had certified that the action involved a question of title to land; and the Taxing-officer yielded to the objection. A certificate was subsequently obtained by the plaintiffs from the arbitrator, who awarded the costs, stating that he intended to have given to the plaintiffs the full costs of the action and reference. An application was accordingly made to Mr. Justice O'Brien, in Chamber, that the award, which had been certified and filed, should be taken off the file and remitted to the arbitrator, for the purpose of amending his award as to the costs, by stating that the action had been brought to try a question of title to land, and by declaring in the award that the plaintiffs were entitled to full costs. The learned Judge granted the application, and the present motion was by way of appeal from that order.

O'Riordan, in support of the motion.

Although the language of section 11 of the Common Law Procedure Amendment Act (1856) is general, and empowers the Court to send back an award for the purpose of having it amended "at any time, and from time to time," still such applications as the present must be made within the time limited by the 173rd General Order for setting aside awards: *Banks v. Holmes* (a). The provisions of section 11 do not give the Court greater powers in this behalf than they would have had if a similar provision had been inserted in the reference, and, therefore, the authorities are not affected by this enactment.—[MONAHAN, C. J. Is that point decided?—Such is the construction given to the corresponding section of the English statute, in *Hodgkinson v. Fernie* (b).—[BALL, J. The objection does not appear in that case to have been pointed to the *time* of setting aside the award.]—If an award may be set aside by the Court, literally *at any time*, it may be so after one hundred years. Except an award be defective on the face of it, the Court will not interfere. In *Ward v. Denn* (c), where the arbitrator found for the defendant, and also directed that the *defendant* was to pay the costs, the Court refused to allow this defect to be

(a) 12 Q. B. 951.

(b) 3 C. B., N. S., 169.

(c) 3 B. & Ad. 234.

amended, not being patent on the face of the award. A similar practice was adopted in *Leggo v. Gray* (a); *Philips v. Evans* (b); *Webber v. Lee* (c).—[CHRISTIAN, J., referred to section 12 of the Act.—KEOGH, J. Is it admitted that this is not a compulsory reference?—It is admitted. He also cited *Morris's Arbitration* (d).

H. T. 1860.
Common Pleas.

CLEARY
v.
CLEARY.

Sullivan and Exham, contra.

The award in this case is defective and vague, the language being ambiguous. Such a defect might be relied upon in an action on an award, under a plea of *nul tiel agard*: *Russell on Arbitration*, pp. 556, 559.—[MONAHAN, C. J. There can be no doubt but that it would have been more correct for the arbitrator to have specifically described what costs he gave, but I conceive by "their costs" he meant the usual costs.]—This case could not have been tried in the Civil-bill Court, as involving a title to land. Under the Act of 1853, an award could not be made absolute until the end of the ensuing Term; but by the 173rd General Order (1856), the time for making it absolute was six days, and, therefore, the Legislature, in order that parties should not be tied up, extended the time for referring it back for amendment, under the general words, "from time to time, and at all times."

O'Riordan was heard in reply.

Cur. ad. vult.

MONAHAN, C. J., delivered the judgment of the Court.

Jan. 30.

This case comes before the Court under the following circumstances. An application is now made, on the part of the defendant in the action, to set aside an order made by Mr. Justice O'Brien, on the 2nd of last December. That order directed that an award made in this case between the parties to the suit, in the month of July last, should be taken off the file, in order that the arbitrator should make an alteration in it. We are now called upon to set

(a) 16 C. B. 626.

(b) 12 M. & W. 309.

(c) 1 Dow. & Lon. 589.

(d) 6 Ell. & Bl. 383; S. C., 25 L. J. 262.

H. T. 1860.
Common Pleas.

CLEARY

v.

CLEARY.

aside or vary that order, on the grounds that Mr. Justice O'Brien had no authority to make such an order. It appears that this case came on for trial at the last Spring Assizes for the county Cork, and it further appears that the parties entered into a consent to refer the matters in dispute to arbitration. The plaintiff, by his summons and plaint, makes several demands: he claims to be entitled to a right of way; also to a right to use a certain water-course; and he also alleges, that trespasses have been committed by the defendant; and by the reference it was consented that all these matters should be submitted to the arbitration of three persons, one of whom was Mr. Justin M'Carty, a barrister. The reference then went on to provide that the decision of any two of them was to be conclusive, and proceeded in these words, in reference to the costs:—"And that the costs of said reference, and of this action, whether any such should be paid, and, if any, whether same should be full or partial costs, should be in the discretion of the said Justin M'Carty." It is clear that, whether any, or if so, whether full or partial costs should be paid, to either party, was referred to Mr. M'Carty alone, and was not to abide the event of the award, according to the decision of the majority of the arbitrators. By the words "partial costs," I presume that it was intended that the arbitrator, having reference to the several matters in dispute, and the circumstances of the case, should be at liberty to award the costs of such particular cause of action to either party, as he should think fit; and also whether same should be full, or any less amount. In pursuance of this reference, it appears that the arbitrators went into the consideration of the case, upon which they appear to have bestowed considerable care, for the award contains sixteen distinct paragraphs, dealing with the several matters referred. That portion of the award having been duly executed by the three arbitrators, the remaining part, relative to the costs, was executed by Mr. M'Carty alone, on the same day. The recital of the award having stated that the question of costs was referred to Mr. M'Carty alone, he accordingly makes his award, in relation thereto, as follows:—"I, the said Justin M'Carty, do also award, adjudge and determine, of and concerning the matters so referred to me solely: I award,

"order and direct that the said defendant do and shall pay to the plaintiffs their costs of the said action, and of the aforesaid reference;" and the award was regularly filed in Court; and in the usual time a rule entered to confirm it, which was duly made absolute. That having been done, the parties proceeded before the Taxing-officer for the purpose of taxing the costs so awarded by Mr. M'Carty. I am not quite sure under what authority the Taxing-officer undertook the taxation of these costs, no judgment having been entered. It is not, however, necessary to inquire, no objection having been made on the subject. The officer proceeded to tax the costs, and a discussion arose before him as to how the costs should be taxed; and it was contended on one side that, inasmuch as the award gave the costs of the action and reference, they should be full costs between party and party; and, on the other side, it was urged that, as the damages awarded only amounted to £1, the plaintiff should have only half costs, such being what he would have been entitled to if that amount had been recovered by verdict and judgment, under the provisions of the 243rd section of the Common Law Procedure Act of 1853.

The Taxing-officer having heard the discussion, and stated his opinion to be that the plaintiff was entitled to no more than half costs, treating the case as if there had been a verdict and judgment, was about to certify the costs on that principle, when it was suggested by the plaintiffs' solicitor, that application should be made to Mr. M'Carty to state clearly what he intended in reference to these costs. He was accordingly applied to for that purpose, and gave a certificate in writing, to the effect that his intention was to give full costs. It then was considered necessary that the award should be sent back to Mr. M'Carty, for the purpose of correcting this supposed ambiguity, and an application to that effect was made before Judge O'Brien in Chamber; and it has been stated, no doubt correctly, that his opinion was that the award, as to the costs, was void for uncertainty, and, therefore, that he had jurisdiction to make the required order. Mr. O'Riordan in support of the motion to set aside the order so made by Judge O'Brien, has referred us to several cases, which decide that where

H. T. 1860.
Common Pleas.

CLEARY
v.
CLEARY.

H. T. 1860. an arbitrator executes his formal award, no cotemporaneous or subsequent document, though signed by the arbitrator, explaining his intention, can be referred to, but that the award must speak for itself; and, no doubt, the cases which he has referred to clearly establish that proposition. He also further argued that, inasmuch as the award in the present case was duly confirmed, according to the course of the Court, at plaintiff's own instance, that the plaintiff is not entitled to have the award sent back to the arbitrator for re-consideration or re-determination, notwithstanding the very general provision on that subject contained in the 11th section of the Common Law Procedure Act of 1856, by which it is enacted that the Court shall have power at any time, and from time to time, to remit the matters referred, or any or either of them, to the re-consideration and re-determination of the said arbitrator or referee, upon such terms, as to costs or otherwise, as to the said Court or Judge may seem proper. And, in support of his argument, Mr. *O'Riordan* has referred us to the very recent case of *Hodgkinson v. Fernie (a)*, which is an express decision on the similar section in the corresponding English Act, and is, no doubt, an authority that the section of the Act referred to does not apply to the case of an award having been made contrary to the rights of the parties, the objection not appearing on the face of the award. But that case seems to be an authority that, if the award is void on the face of it, not having decided some matter which ought to have been decided, that in such a case the Court would be justified in remitting the case to the arbitrator, for re-consideration and determination; and, therefore, it occurs to us that the order of Judge O'Brien cannot be sustained, unless we are of opinion that in a Court of Law the award of Mr. M'Carty is altogether void as to the costs; or, in other words, that if an action were brought on the award for the costs, and that in one count or paragraph the plaintiff claimed the full costs, and in another count that he claimed half costs, that the Court would be bound to decide that he was not entitled to either, it being uncertain which the arbitrator intended to award him. No doubt, an award, like any other docu-

(a) 3 C. B., N. S., 189.

ment, may be void for uncertainty; but everyone is aware of the well-known rule of construction, that the Court will never hold a document void if, by any reasonable construction, it can be considered as sufficiently certain. This renders it necessary for us carefully to consider the award in its original state, in order to ascertain whether it is capable of any, and, if so, what certain construction. Now it must be borne in mind that, by the order of reference, the costs thereof and of the action, whether any such should be paid, and, if any, whether same should be full or partial, is left altogether to the discretion of the legal arbitrator, and is not in any way to abide the event of the suit. The arbitrator may, in his discretion, give no costs; he may give full costs or partial, that is, any proportion of full costs he pleases; or he may give costs of one part of the proceedings to the plaintiff, and of another part of the proceedings to the defendant; and of course it is his duty by his award to state which of the several courses he has adopted. Now bearing this in mind, and recollecting also that the award in terms recites the order of reference, showing the duty of the arbitrator in relation to the costs, the question is, what is the reasonable construction of these words:—"I, the said Justin M'Carty, do also award, adjudge and determine, "of and concerning the matter so referred to me solely: I award, "order and direct that the said defendant do and shall pay the "plaintiffs their costs of the said action, and of the aforesaid "reference?" I confess I feel at a loss to understand what meaning "plaintiffs' costs of the action and reference" can have, but the sum expended by them in the prosecution of the action and reference; and I do not see anything whatever which would lead me to the conclusion that anything but the entire costs was intended. If anything else was intended, it certainly could have been expressed. Unless it is construed as meaning the entire costs, it must be altogether void, as there is no reason why it should mean half costs more than one-fourth or any other proportion. The expression "plaintiffs' costs of the cause" must have its ordinary meaning, unless there is something in the context to show that something else was intended. I, therefore, cannot entertain any

H. T. 1860.
Common Pleas.

CLEARY
v.
CLEARY.

H. T. 1860. *Common Pleas.* doubt that the true construction of the award is, that plaintiffs are thereby entitled to their full costs of the cause and reference; and I cannot believe that, if an action were brought on this award, any Court would hold it void for uncertainty. The result, therefore, is, that we must set aside the order made by Judge O'Brien, and have the award restored to its original state; but, as we have made this order on the grounds of the award having a certain construction which I have stated, we will not, on any future occasion, hear any discussion on the subject. The result, therefore, will be that, though we set aside the order complained of, the plaintiffs will be entitled to the costs of the action and reference, as if that order had not been appealed from, or had been affirmed.

Rule accordingly.

M. J. COLLES, Administratrix of M. COLLES, deceased,

v.

M. H. PRENDERGAST.

Jan. 25.

To an action for £40 arrears of rent, the defendant pleaded, by way of equitable defence, as to £14. 2s. 0½d., that R. had purchased the arrears from the plaintiff's testator, and that the plaintiff therefore was suing as R.'s trustee. That after R. had purchased the arrears, and before this action, R. was indebted to P. in a sum of £14. 2s. 0½d., being the balance of a sum of £20, which R. had, by agreement bearing date the 24th of March 1855, promised to pay to P. on receiving "full legal possession of certain premises from P. and his wife;" and that although R. did receive such "full legal possession," yet that he only paid £5. 17s. 11½d., leaving a balance of £14. 2s. 0½d. due. That P. assigned the latter debt to the defendant; and that P. and the defendant mutually agreed that R. should retain the debt so due by him to P., in satisfaction of so much of the arrears of rent; of which R. had notice. It appeared from certain letters, which comprised the above agreement of the 24th of March 1855, and which the Court permitted to be used on the argument, upon the authority of *Armstrong v. Turquand* (9 Ir. Com. Law Rep. 32), that the agreement was for payment of £20, to P. and his wife, upon R. receiving from them full legal possession of certain premises, of which they were jointly seised as tenants for life.—*Held*, insufficient, as an equitable defence.

yearly rent of £16, payable half-yearly; that Maurice Colles died intestate; and that the sum claimed, being two and a-half years' rent of the demised premises, was then due to the plaintiff, as his administratrix.

H. T. 1860.
Common Pleas.
COLLES
v.
PRENDER-
GAST.

The defendant pleaded the following equitable defence as to £14. 2s. 0½d., parcel of the sum of £24, the three first half-yearly gales of rent claimed by the summons and plaint:—That one John Reynolds purchased the said arrears of rent from Maurice Colles in his lifetime. That the plaintiff is now suing as trustee for John Reynolds; that after John Reynolds became entitled to the same, and before the commencement of this suit, the said John Reynolds was indebted to one John Prendergast, in the sum of £14. 2s. 0½d., being a balance remaining due at foot of an account of £20, which John Reynolds, by agreement in writing, bearing date the 24th of March 1855, agreed to pay to John Prendergast, in consideration of receiving full legal possession of certain premises from John Prendergast and his wife; and that although John Reynolds did receive such full legal possession, yet that he only paid the sum of £5. 17s. 11½d., at foot of the sum of £20, leaving the balance, £14. 2s. 0½d., due to John Prendergast. That John Reynolds being so indebted to John Prendergast, and John Prendergast being indebted in the same amount to the defendant, he (John Prendergast), in satisfaction of the debt so due by him to the defendant, assigned to the defendant the said debt so due to him by John Reynolds, and that the defendant and John Prendergast mutually agreed that John Reynolds should retain the said debt due by him to John Prendergast, in satisfaction of so much of the arrears of rent; of which John Reynolds had notice before the commencement of the action.

Demurrer, upon the following grounds:—That the defence shows no right of set-off, which, if established as pleaded, would deprive J. Reynolds of any set-off he might have against J. Prendergast; and that a question of set-off cannot be raised in an action, as existing between two persons who are not parties thereto. That no valid assignment of the debt sought to be set off, nor any assent by J. Reynolds to the alleged agreement, is shown.

H. T. 1860.
Common Pleas.
 COLLES
 v.
 PRENDER-
 GAST.

That no equitable grounds of defence are stated, within the 85th section of the Common Law Procedure Act. That the written agreement of the 24th of March 1855 (which is incorporated in the defence) varies from the agreement pleaded, in this, that the agreement pleaded is to pay a sum of money to J. Prendergast, whereas the real agreement was to pay that sum to him and one Alicia Prendergast jointly: that said sum was not payable under the agreement, until certain lands were released from the defendant's claims. That there is no averment of any deed transferring the legal possession to J. Reynolds.

The agreement referred to was contained in the following letters:—

“To JOHN REYNOLDS, Esq.”

“SIR.—We hereby propose and agree to sell to you our right, title and interest in the two houses in the green of Kiltonner, lately occupied by John Coughlan and Edward M'Donnell, together with one half-acre of land in the Race-park, as demised by the Reverend Charles Kelly to James Costello, by lease, bearing date the 24th day of May 1832, at a rent of £3 per annum; and of which houses and lands James Costello granted to us a lease during the period of our natural lives, at a rent of £3 per annum, in consideration of receiving from you, on receiving full legal possession, a sum of £20, and that you will cancel all claims against us for all rent and arrears now due to you, as head-landlord of said houses and land; and further, that on being placed in full and undisturbed possession of said land and houses, you will abandon all claims which you may have to a sum of about £50, now lodged in the Landed Estates Court, and in the case entitled *Money Penny v. Prendergast*; and that, upon the completion of this agreement, you agree to give a letter to the Commissioners of the Incumbered Estates Court, abandoning all claims to said sum of £50 sterling.

(Signed)

“JOHN PRENDERGAST.”

“ALICIA PRENDERGAST.”

“24th of March 1855.”

"Kiltonner, 24th of March 1855.

H. T. 1860.

Common Pleas.

COLLES

v.

PRENDER-
GAST.

"SIR.—I have read the annexed letter, signed by John Prendergast and Alicia Prendergast, and I hereby agree to same; "and as a creditor on said houses and land, I agree to release "same from any claim of mine, in consideration of your carrying "out said agreement.

(Signed)

"MARY ANNE PRENDERGAST."

"To JOHN REYNOLDS, Esq."

Palles, in support of the demurrer.

The agreement is contained in the letters of March 24th.—[*Plunket* objected to the production of these letters upon argument of the demurrer, citing *Sim v. Edwards (a)*.—MONAHAN, C. J. It has been already decided by this Court, in *Armstrong v. Turquand (b)*, that the Court is at liberty, upon argument of a demurrer, to look into the documents referred to in the pleadings.]—This, being a debt due to husband and wife, would have survived to the wife, and, therefore, could not be set off by the husband alone: 1 *Wms. Exors.*, p. 766; *Harrison v. Andrews (c)*; *Clark v. Cort (d)*; *Watts v. Christie (e)*; *Acheson v. Acheson (f)*. If this came before a Court of Equity, J. Prendergast should be a party; not being a party to the present suit, he is at liberty to sue J. Reynolds for this sum of £14. 2s. 0½d.; and therefore, inasmuch as final justice cannot be done between the parties, the Court will not allow this equitable defence: *Wodehouse v. Fairbrother (g)*; Common Law Procedure Amendment Act 1856, s. 85.—[CHRISTIAN, J. Is there any decision to the effect that, in a simple case, where full relief could be granted in a Court of Equity, an equitable defence would be inadmissible in a Court of Law, solely upon the grounds that a person who might have been bound in Equity could not be bound at Law, inasmuch as he could not be made a

(a) 15 C. B. 240.

(b) 9 Ir. Com. Law Rep. 32.

(c) 13 Sim. 595.

(d) 1 Cr. & Phil. 154.

(e) 11 Beav. 546.

(f) 11 Beav. 485.

(g) 5 Ell. & Bl. 277.

H. T. 1860. party to the action?]—That point does not appear as yet to have
Common Pleas. been decided.

COLLES

v.

PRENDER-
GAST.

Plunket and C. Kelly, contra.

This would be a good set-off in a Court of Equity: *Ransom v. Samuel* (a); *Peters v. Soame* (b); *Ex parte Stephens* (c). A legacy to a wife may be set off by her husband: *M'Mahon v. Burchell* (d). Admitting that this sum is made payable to husband and wife, nevertheless, the act of set-off by the husband amounts to *reductio in possessionem*.

This set-off is good at Law: *Cavendish v. Graves* (e); *Freeman v. Lomas* (f); *Story's Eq. Juris.*, p. 1436 a; *Burn v. Carvalho* (g); *Morrell v. Wotten* (h); *Ex parte Smith* (i); *Bell's Husband & Wife*, p. 69. This objection should be raised on motion to set aside the defence under section 88 of the Common Law Procedure Act (1856): *Considine v. Tubbledy* (k).

Palles, in reply, cited *Turner v. McAuley* (l); *Hammond v. Messenger* (m); *Carr v. Taylor* (n).

Cur. ad vult.

CHRISTIAN, J., delivered the judgment of the Court.

This case came before us upon demurrer to a defence. The action was brought by Martha Jane Colles, as administratrix of Maurice Colles, deceased, against the defendant, R. M. Prendergast, for rent. Amongst other defences the following was pleaded.—[His Lordship read the equitable defence.]

To this defence the plaintiff has demurred; and the question for our determination is whether, as to this sum of £14. 2s. 0½d.,

(a) 1 Cr. & Phil. 14.

(c) 11 Ves. 24.

(e) 24 Beav. 163.

(g) 4 Myl. & Cr. 702.

(i) 3 Swans. 393.

(l) 6 Ir. Com. Law Rep. 248.

(b) 2 Ver. 428.

(d) 5 Hare, 325.

(f) 9 Hare, 109.

(h) 16 Beav. 203.

(k) 2 Ir. Jur., N. S., 188.

(m) 9 Sim. 327.

(n) 10 Ves. 574.

it discloses a defence upon equitable grounds, valid in itself, and of the kind which, under the 85th section of the Procedure Act (1856), we have jurisdiction to entertain?

H. T. 1860.
Common Pleas.
COLLES
v.
PRENDERGAST.

Repeated decisions, both in this country and in England, have now settled the limits of this new jurisdiction. The facts pleaded must be such that, although the defence is equitable, the Court can pronounce upon it a Common Law judgment. If the Court can see that, supposing it were to give judgment for the plaintiff, that judgment would be liable to be, in effect, reversed by the Court of Equity decreeing against it an injunction, immediate, unconditional and perpetual, then the Court of Law is empowered to prevent that circuitry, by pronouncing judgment for the defendant, in its own appropriate form, viz., "that the plaintiff take nothing by his writ, and that the defendant go thereof without day." But if the decree which a Court of Equity would pronounce would not be thus simple and final, but would be clogged with conditions or preliminaries which the forms of Common Law judgments, or the machinery of its procedure, are not adapted for directing or for carrying out, then the Court of Law declares itself incompetent to deal with such a defence, and leaves the defendant to his remedy in the Court of Equity. This is the way in which the law is explained by Lord Campbell, in *Wodehouse v. Fairbrother (a)*, which has been followed in several other cases.

In the present case, if the only materials we had to deal with were those which are spread upon the defence, the case would stand thus:—The defendant admits that he owes the rent sued for, but the plaintiff, he says, is only a trustee for Reynolds. Reynolds was indebted to one John Prendergast in a sum equal to the rent. John Prendergast, for valuable consideration, assigned the debt to the defendant; and they (that is, the defendant and Prendergast) agreed that Reynolds should retain that debt in satisfaction for the rent. There is no averment that Reynolds was privy to that agreement, or that he ever agreed that the defendant should retain his rent in satisfaction of the debt which Reynolds owed Prendergast.

(a) 5 El. & Bl. 277.

H. T. 1860.

*Common Pleas.*COLLES
v.PRENDER-
GAST.

or the defendant, as Prendergast's assignee. Neither is it averred that there was any original connection between these two choses in action, as, for example, that they had their origin in mutual credit. It is simply a case of cross demands, one legal, the other equitable. What relief would these facts *entitle* (to use the language of the 85th section) the defendant here to in Equity, against a judgment in this action? An assignee for valuable consideration of a legal chose in action, though, in the eye of a Court of Equity, owner of the debt, cannot sue for it in Equity, without making a special case, such as collusion, between the debtor and the assignor. His remedy is by action at Law, in the name of the assignee: *Hammond v. Messenger* (a). Is then the circumstance that the debtor has got judgment against him at Law, for another debt of the same amount, alone sufficient to entitle him to come into Equity, in order to enforce a set off? and can we see that, in this case, if we gave judgment for the plaintiff, and the defendant filed such a bill, he would be entitled to obtain, at the hearing, a decree annulling our judgment, by decreeing an immediate, unconditional, perpetual injunction against the execution of it? Now if it were necessary, for the disposal of the present case, that we should decide that question, I, speaking for myself (and even putting out of view the special considerations growing out of the connection of Prendergast's wife with the consideration for the debt), would not be prepared to say that we could hold that the defendant here would be entitled to that relief. Upon the question whether, merely for the purpose of obtaining a set-off of creditors' demands, having no special connection with each other, a Court of Equity may be resorted to, the authorities are such as that, though it is possible the Lord Chancellor, sitting in his Court, might not think he was coerced by them to decide against such a suit, yet it would not, in my opinion, be possible for us, sitting here, to contravene them. I allude especially to what is said by Lord Cottenham in *Rawson v. Samuel* (b), to the case of *Freeman v. Lomas* (c), to *Story's Eq.*

(a) 9 Sim. 327.

(b) 1 Cr. & Phil. 172.

(c) 9 Hare, 312.

Jur., s. 1436, and the cases in the note there. The case of *Clark v. Cost (a)*, which was cited for the defendant, is plainly distinguishable, and, I may observe, does not, in my opinion, warrant the generality of its marginal note.

H. T. 1860.
Common Pleas.
COLLES
v.
PRENDER-
GAST.

I do not, however, go further into that question, because it is not necessary for us to give any opinion upon it. There are other and simpler grounds on which the case must be decided. I have hitherto been considering it as if we had nothing before us but the defence. We are not, however, confined to that. According to the construction which the Court has, in the case of *Armstrong v. Turquand (b)*, and in many other cases, put upon the 64th section of the Procedure Act (1853), we are entitled to look at the written document itself, which is referred to in the defence, and to consider it as if set out at length therein. When we do so, we see much more clearly the nature of the rights which the defendant acquired, as assignee of Prendergast, and of the relief to which she would be entitled in a Court of Equity. The debt which is alleged to have been due by Reynolds to Prendergast was a portion of the consideration to be paid by Reynolds for the purchase of two houses, of which John Prendergast and Alicia his wife were seised, under a lease granted to them jointly, during their natural lives. The agreement appears to be signed by Prendergast and his wife; but, being void as to her, by reason of her coverture, it is, in legal effect, an agreement by him alone, that he and his wife will convey to Reynolds this freehold interest, for the considerations mentioned. One of these considerations was the payment of £20, "on receiving full legal possession;" and this is what is averred to have been assigned by Prendergast to the defendant. Now it is perfectly clear, upon the construction of this agreement, that Reynolds was entitled to have a good title made out, and a conveyance executed to him by Prendergast and his wife (acknowledged by the latter in the manner required by the Fines and Recoveries Abolition Act), before he could be called on to pay one shilling of the £20. Suppose then that the defendant here, in her quality of assignee of Prendergast, filed a bill in Chancery, what should it pray, and

(a) 1 Cr. & Phil. 154.

(b) 9 Ir. Com. Law Rep. 32.

H. T. 1860. *Common Pleas.* what relief would she obtain? Reynolds and Prendergast should both be defendants, and the prayer should be that the agreement be specifically performed; that Prendergast should (together with his wife) execute a valid conveyance to Reynolds, and that thereupon the latter should pay the purchase-money. When that cause came to a hearing, Reynolds would be entitled, if he pleased, to claim a reference as to title; and no decree for the purchase-money could be made against him, until a report of good title was made, and a valid conveyance executed. Now, suppose it were made part of the prayer of that bill, that Reynolds' purchase-money be set off against the judgment in this action, and that a perpetual injunction be granted against issuing execution thereon, how would that part of the prayer of the bill fare at the hearing? That is what we have to consider. For myself I will say that I have no doubt whatever that the bill would, as to that part, be dismissed with costs, either for want of equity, on the grounds I have already adverted to, or as improperly joined with the other subject-matter of the suit; and even if it were not, it would either stand over, under the common reservation of further directions, to abide the result of the reference as to title, and await the execution and acknowledgment of a legal conveyance, or, in the most favourable view imaginable, an injunction might possibly be granted, upon the condition of bringing into Court the amount of the debts and costs at Law, to abide the event of the cause. But, even that condition, single and simple as it seems, is precisely of the kind which, according to *Wodehouse v. Fairbrother*, the Common Law form of judgment is inadequate to express or enforce, and which therefore renders it impossible to present the defendant's equity, in the form of an equitable defence, in an action at Law.

It was, however, argued that, on the averments in this defence, it must be intended that everything which was necessary to make the money payable presently by Reynolds was in fact done. For this purpose reliance was placed upon the averment that the agreement to pay was in consideration of receiving full legal possession, and that Reynolds *did* receive full legal possession. We are, however, of opinion, upon reading the agreement itself, that the consideration for

the purchase-money was not merely the receiving possession, but the receiving a good title and a legal conveyance as well. That, we think, is the meaning of the expressions, "receiving full legal possession," where they occur in the agreement, as the language of the parties, and as explained by the context. But when we meet with the same form of expression put by way of averment in a pleading, it is obvious that it must be construed by very different rules. Facts which are material to the case of the pleader must be averred with directness and precision; and we think it impossible to hold that the statement in this pleading, that "Reynolds did receive full legal possession," is an averment that a good title was shown to or was waived by him, and that a valid legal conveyance, acknowledged according to the statute, was executed by Prendergast and his wife. If we were now to hold that this defence is valid, we should be, in effect, obliging Reynolds to pay his purchase-money without knowing whether he has ever yet obtained either title or conveyance. These are points which the Court of Equity would be competent to put in a train for ascertainment, but with which we are powerless to deal.

For these reasons, we are of opinion that whatever rights the defendant may have in a Court of Equity, as assignee of Reynolds' purchase-money, they are not such as can be made the subject of an equitable defence in this Court, and that, consequently, the demurrer must be allowed.

Demurrer allowed.

H. T. 1860.
Common Pleas.

COLLES
v.

PRENDER-
GAST.

H. T. 1860.

Common Pleas.

Jan. 27, 28.

Feb. 18.

EYRE v. WALSH.

A, the owner of a fee-simple estate, let C into possession of a portion of the lands, as tenant at will. Subsequently, in 1806, the lands were settled by A upon himself for life, with remainder to B in fee. A died in 1811. C continued in possession, without payment of rent or acknowledgment of title, until 1847, when he assigned his interest to his son D, the defendant, and died in 1857. In 1830, a mortgage in fee was executed by the devisee of B, which, by means assignments, became vested in one of the plaintiffs, who, in 1859, brought an ejectment

THIS was an ejectment on the title, brought to recover the lands of Freshford, in the county of Kilkenny. At the trial, before Fitzgerald, B., at the last Kilkenny Assizes, the plaintiff proved the will of one William Ryves, whose property had included the lands now sought to be recovered, dated in November 1762, devising the Freshford estate to his daughter Julia Morris for life, with remainder to her first and other sons successively in tail; also a recovery was suffered of the same estate by the said Julia Morris and her eldest son, William Ryves De Montmorency, of Trinity Term 1806, together with a deed, dated 11th of June 1806, leading the uses of that recovery, for Julia Morris for life, with remainder to said W. R. De Montmorency in fee; a recovery suffered of same estate by said W. R. De Montmorency, as of Trinity Term 1828, together with a deed, dated in May 1828, leading the uses of that recovery, for the said W. R. De Montmorency in fee; also the will of W. R. De Montmorency, dated in April 1829, devising same estate to his son, William De Montmorency, in fee; also a mortgage in fee, dated 18th of December 1830, of the same estate, by W. De Montmorency to John Smithwick, and several transfers of same, dated respectively in 1834, 1841, 1842 and 1847, the last being to two of the plaintiffs. This mortgage appeared to have been paid off; but no re-conveyance had been executed. Julia Morris was proved to

on the title against D.—*Held*, that, assuming the possession of C not to have been adverse at the date of the execution of the mortgage in 1830, the mortgagee, who had received interest within twenty years next before the bringing of the ejectment, was entitled, by the 7 W. 4 and 1 Vic., c. 28, to recover possession, though more than twenty years had elapsed since the title of the mortgagee had accrued.

Quare—Whether the possession of C became, in 1811, upon the death of the tenant for life, adverse to the remainderman?

An affidavit, sworn by a party for the purpose of parliamentary registration, under the 10 G. 4, c. 8, in which it was stated that he held under a lease, and an entry, made in the registry-book by the Clerk of the Peace, stating, amongst other particulars, the life in the lease to be that of the tenant, were produced as secondary evidence of such a lease.—*Held*, that inasmuch as such entry was, by the statute, directed to be made by the Clerk of the Peace, from the contents of the affidavit, which was silent about the terms of the lease, his act was, to that extent, extra-ministerial, and the entry could not be made evidence thereof.

have died in 1811. The plaintiff Eyre had purchased, in 1850, the estate in the Incumbered Estates Court, though no conveyance had been executed to him; and his agent had paid interest to the then holder of the mortgage, up to June 1856. In order to show the nature of the defendant's possession, evidence was given to show that the defendant and his father occupied the premises, and that, on the 22nd of October 1829, and the 3rd of July 1839, the father, James Walsh, made, for the purposes of parliamentary registration, affidavits stating that his qualification arose from premises in Freshford, in which he resided, and held by him under a lease, dated 5th of May 1829, executed by W. De Montmorency. The entries of these affidavits, contained in the books of the Clerk of the Peace, were also given in evidence, and were received, subject to objections made by the defendant's Counsel. The entries were as follows, viz:—

H. T. 1860.
Common Pleas.

EYRE
v.
WALSH.

Name of Freeholder.	Place of Abode.	Situation of Freehold.	Name of Landlord.	Value of Freehold.	Name of Lives, and other Tenure.	Place and Date of Registry.
James Walsh, Farmer	Freshford	Freshford	Wm. De Montmorency	£10	James Walsh	Kilkenny, 22nd Oct. 1829.

Number	Name of Elector.	Residence.	Situation of Leasehold or Freehold.	Description.	Name of Landlord.	Yearly Value.	Place and Date of Registry.
13	Walsh, James	Freshford	Freshford	House and Land	Wm. De Montmorency	£10	Kilkenny, 3rd July, 1839.

James Walsh died in 1857. No payment of rent by the Walshs was proved. The plaintiffs also gave in evidence an affidavit made by the defendant Michael Walsh, in the Incumbered Estates Court,

H. T. 1860.
Common Pleas.

RYEE
v.

WALSH.

on the 10th of May 1848, in the matter of William De Montmorency, owner and petitioner, and made by way of objection to the rental lodged in the matter, which stated that his father, James Walsh, was coachman to the said Julia Morris (called in the affidavits Lady Maria Juliana Morris), for about twenty-two years, and that, in consequence of his faithful services to her, she gave him, in or about the year 1801, the premises in question; and that, after building a house thereon, he, by deed, dated the 6th of February 1847, conveyed the said premises to said defendant and his heirs. At the close of plaintiffs' case, Counsel for defendants required the learned Judge to nonsuit the plaintiffs, on the ground that their evidence showed a possession in the late James Walsh of the premises in question, without payment of rent, or acknowledgment of title, for upwards of twenty years. His Lordship having declined, the defendants simply produced the deed of the 11th of February 1847, referred to in the affidavit of Michael Walsh, the execution of which had been previously proved by one of the plaintiffs' witnesses, and closed their case. The learned Judge told the jury that, in his opinion, the affidavits of James Walsh, made in 1829 and 1839, uncontradicted and unexplained, were conclusive evidence against James Walsh, and all deriving under him, that the premises in respect of which he was then seeking to register were held by him under a deed of May 1829; and further, that those premises were then in his occupation by actual residence; and that, if they believed that the only premises in Freshford on which James Walsh resided were the premises in question, and that James Walsh, named as the *cestui que vie* in the books of the Clerk of the Peace, was that same James Walsh who died before the commencement of this action, they ought to find a verdict for the plaintiffs, and that, *prima facie*, the inference to be drawn from the registry was, that the said James Walsh and the person therein mentioned were the same. Counsel for the plaintiffs then called on his Lordship to tell the jury that, there being no evidence to the contrary, the James Walsh named in the book of the Clerk of the Peace was the James Walsh the party registering. This his Lordship refused to do. They then called on him to tell the jury that, though they should

be of opinion that the premises in question were not held by James Walsh for his own life, under a deed or lease of 1829, they ought, nevertheless, to find for the plaintiffs, inasmuch as the defendant's affidavit in the Incumbered Estates Court showed that his father's possession was obtained from Julia Morris, who was only tenant for life of the estate, and who was proved to have died within twenty years before the mortgage of 1839, on which mortgage interest was proved to have been paid up to 1856. His Lordship thought that the plaintiffs were entitled to this direction; but, after some discussion, it was agreed that the verdict of the jury should be received, who had found for the defendant, upon the ground that the premises in question were not held by Walsh under any deed or lease of May 1829; the defendants assenting that the verdict should be changed into one for plaintiffs, if the Court should be of opinion that the Judge ought to have so directed, on the other ground. In his report of the case, his Lordship added that, supposing him to have been right in admitting the books of the Clerk of the Peace in evidence, the verdict of the jury, on the ground on which it proceeded, did not appear a satisfactory verdict on the evidence.

H. T. 1860.

Common Pleas.

EYRE

v.

WALSH.

In Michaelmas Term (November 4), Counsel on behalf of plaintiffs obtained a conditional order to set aside the verdict, and enter one instead for plaintiffs, pursuant to leave reserved, or for a new trial, upon the ground of misdirection, and said verdict being against evidence and the weight of evidence.

Rolleston and *J. E. Walsh* (with whom was *M. O'Donnell*) showed cause.

The possession of James Walsh, the father of the defendant, was adverse to the De Montmorencys', having become so upon the death of the tenant for life, who let him into possession: *Doe v. Gregory* (a); *Doe v. Scott* (b). The 7 W. 4 and 1 Vic., c. 28, which was passed to explain a doubt which had arisen upon the construction of 3 & 4 W. 4, c. 27, in *Doe v. Williams* (c), only applies

(a) 2 Ad. & Ell. 14.

(b) 4 B. & Ad. 706.

(c) 5 Ad. & Ell. 291.

H. T. 1860. where the possession was non-adverse at the time of the execution:
Common Pleas.

BYRE
 v.

WALSH.

Doe d. Eyre v. Palmer (a); otherwise the former Statute of Limitations, having begun to run in favour of the party in possession, could not have been stopped. The verdict is not impeachable on the ground of being against the weight of evidence, inasmuch as the book of the Clerk of the Peace was not properly admitted. No notice to produce had been served; and *Lawless v. Quocle* (b), in this country, maintains a contrary doctrine from that laid down in *Slatterie v. Pooley* (c). The entry, which mentions James Walsh to be the life in the lease for which he held, was made after the 10 G. 4, c. 8, s. 8. The affidavit is according to the form in Schedule IV of that Act, and essentially differs from that required by the previous Act, 45 G. 3, c. 59, as the lives need not be stated. It was no part of the duty of the Clerk of the Peace to make this portion of the entry, and it is no evidence of the fact.

R. Armstrong and J. B. Murphy, contra.

The possession here was not adverse at the date of the mortgage, and, consequently, the bar of the statute was saved by the 7 W. 4 and 1 Vic., c. 28: *Doe d. Souter v. Hull* (d); *Nepean v. Doe* (e); *Shelford's Real Property Statutes*, p. 130; *Roe v. Ferrars* (f); *Doe v. Perkins* (g); *Co. Lit.*, p. 57 b. Therefore, assuming that Walsh was a tenant at will, the title of the mortgagee was not barred by the Statute of Limitations. With respect to the other question, the verdict was against the weight of evidence, inasmuch as the entry made by the Clerk of the Peace was conclusive evidence that the former tenant, from whom the defendant Walsh derives, held under a lease for his own life, which dropped in 1857. The 45 G. 3, c. 59, s. 3, required the Clerk of the Peace to compare the lease with the affidavit. Consequently, his entry thereof, being made in the discharge of his official duty, is evidence.

(a) 17 Q. B. 363.

(b) 8 Ir. Law Rep. 382.

(c) 6 M. & W. 664.

(d) 2 D. & R. 38.

(e) 2 M. & W. 910; S. C., Sm. L. Cas. 534.

(f) 2 Bos. & Pull. 542.

(g) 3 M. & S. 271.

There could have been no question of identity. The 10 G. 4, c. 8, H. T. 1860.
does not repeal the 60 G. 3 and 1 G. 4, c. 11, s. 13. *Common Pleas.*

O'Donnell replied.

Cur. ad. vult.

RYNE
v.
WALSH.

MONAHAN, C. J., now delivered the judgment of the Court.

Feb. 16.

This case was tried before Baron Fitzgerald, at the last Assizes for the county of Kilkenny. A verdict was entered for the defendant; and an application has been made to this Court, upon points saved at the trial, that it should be changed into a verdict for the plaintiff. A portion of the conditional order was to set aside the verdict found, on the ground of being against the weight of evidence. It appears from the report of Baron Fitzgerald that, in the year 1762, William Ryves, being seised in fee-simple of this property, made his will, by which he devised to Julia Morris for life, with remainder over. In 1806, a recovery was suffered by Julia Morris and her eldest son, William Ryves De Montmorency; and a new settlement of the estate was then made, by which she became tenant for life, with remainder over in fee to William Ryves De Montmorency. In 1829, the latter made his will, by which he devised his estate to his son William De Montmorency in fee. Julia Morris died in 1811, upon which event her son became seised in fee of the property. In 1830, he executed a mortgage to John Smithwick, and this was assigned subsequently in 1834, 1841, 1842 and 1847, the last assignment being to the late Judge Moore. This mortgage was paid off; but no re-conveyance of the legal estate was effected; and the heir-at-law of the late Judge Moore, in whom that legal estate is now vested, is one of the plaintiffs in the present action. The case made by the principal plaintiff to recover the property, as against the defendant, and upon which the chief question arises, is this:—It appears, from evidence given by the plaintiff, namely, an affidavit, made by the defendant in the Incumbered Estates Court, that, in the year 1806, Julia Morris, by parol, made what is described in the affidavit as a gift of the plot of ground in question, to a person of the name of J. Walsh—I believe the father of the defendant—he being a servant of the family; that he con-

H. T. 1860.
Common Pleas.

EYRE
 v.

WALSH.

tinned in possession from 1806 to 1847, and that since then the present defendant has been in possession. The plaintiff contended, at the trial, that Julia Morris being tenant for life of the property, J. Walsh, to whom she gave the possession, was merely tenant at will to her until her death in 1811, when her estate, and that of her tenant at will, determined; and, inasmuch as the mortgage to Smithwick, which is now vested in the plaintiffs, was executed within twenty years from the death of Julia Morris, that the mortgagee had then a right to enter on the possession of J. Walsh; and, as interest has been regularly paid on the mortgage up to a recent period, that the mortgagee has now a right to enter, and consequently maintain the present ejectment, under the recent Mortgage Act (7 W. 4 and 1 Vic., c. 28). We all know the circumstances under which that Act was passed. An ejectment had been brought by a mortgagee, to recover the mortgaged premises, more than twenty years after the date of the mortgage, the interest having in the meantime been regularly paid. A doubt was suggested, whether the title was not barred by the Statute of Limitations, the 8 & 4 W. 4, c. 27, the right of entry having accrued more than twenty years. The consequence of such a state of things was alarming; and, accordingly, the 7 W. 4 and 1 Vic., c. 28, was passed, which, after reciting the doubts that had arisen, enacted that a mortgagee may make an entry, or bring an action at Law or suit in Equity, at any time within twenty years next after the last payment of any part of the principal money or interest secured by the mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry, or bring such action or suit in Equity, shall have accrued, anything in the said Act notwithstanding. Now the plaintiff contends that the effect of this Act is to enable the mortgagee to recover, even though the possession of Walsh was adverse to the mortgagor at the time of the execution of the mortgage, inasmuch as even though adverse, no doubt, the mortgage on its execution conferred on the mortgagee a right to enter, seeing that Walsh's possession, even though adverse, was not then of twenty years' duration, the adverse possession not having commenced until the death of the tenant for

life, Julia Morris, in 1811; and, no doubt, if one were to read merely the enacting part of the Act in question, it would seem to be capable of that construction. But then we must see whether this be the true reading of the Act; for, if so, the result would be, that if, at the time of the execution of the mortgage to Smithwick in 1830, Walsh had been in possession, not as tenant, but adversely, the right of entry would not have existed at the time of the passing of the 3 & 4 *W. 4*, c. 27; for, under the old Act of Parliament, 10 *Car. 1*, sess. 2, c. 6, s. 12 (*Ir.*), when once the twenty years began to run, no transfer of the right of entry would stop the running of the Act; and, therefore, if the possession had been adverse at the time of the execution of the mortgage, the mortgagee would have been bound, at the expiration of the twenty years from the commencement of such adverse possession, independently of the passing of the 3 & 4 *W. 4*, c. 27.

Therefore, the question is, what is the true construction of the 7 *W. 4*, and 1 *Vic.*, c. 28? Is it to give the mortgagee a right of entry, although none existed previous to the passing of the 3 & 4 *W. 4*, c. 27?

We are of opinion that such is not the true construction of the Act, but that the meaning of it is merely this, that nothing in the Act of 3 & 4 *W. 4*, c. 27, shall have the effect of preventing a mortgagee from entering, whose interest has been regularly paid, but that there is nothing in the Act giving him a right to enter, if his entry would be barred by the previous statute, and which was, in fact, barred, prior to the 3 & 4 *W. 4*. Another question, of some nicety, is whether the old statute of Limitations is still in force, or was impliedly repealed by the 3 & 4 *W. 4* as amended by the 7 *W. 4*, and 1 *Vic*? It has not been expressly repealed, but a new period of limitation is given. But we cannot suppose that the effect of the 3 & 4 *W. 4*, c. 27, was to take away from the person in possession any defence which he originally had; and, therefore, we are of opinion that the construction of this Act is, that if, at the time of the passing of the 3 & 4 *W. 4*, c. 27, this right was barred, there is nothing in the later Act to give the mortgagee a new right of entry. Assuming such to be the true construction of the

H. T. 1860.
Common Pleas.

ETEE
v.
WALSH.

H. T. 1860. 3 & 4 W. 4; as amended by the 7 W. 4, and 1 Vic., the plaintiff's right to have a verdict entered for him, in pursuance of the leave reserved at the trial, will depend on this question, was the possession of Walsh permissive or adverse, at the time of the execution of the mortgage? It appears that Julia Morris gave this property by parol, not by feoffment, or deed of gift, to the defendant's father, and so she only allowed him to take possession; and probably that was only for so long a period as she herself was entitled, namely, for her life, he having no conveyance. After that, the property vested in the remainderman, who derived under the same title as Julia Morris. The remainderman does not interfere, nor is any act done by the Walshes prior to the passing of the 3 & 4 W. 4, c. 27. If this had been the point on which the trial proceeded, we probably should feel ourselves bound to decide whether, in such a state of circumstances, in the absence of evidence on the one side or the other, the possession of the Walshes ought to be considered as having been merely by the permission of the remainderman, so as that the entry of the remainderman and his mortgagee was not barred by the Statute of Limitations, or whether it should be considered adverse, and the right of entry of the remainderman barred; and we should have to consider whether this case was governed by the case of *Doe v. Gregory (a)*. There, a married woman, tenant for life, married a second time; she and her second husband levied a fine on the property, and he, after her death, continued in possession more than twenty years. The heir to the property brought an ejectment, and the question was, who was entitled? For the defendant, it was said that the fine barred the right. But the Queen's Bench decided that the fine had no operation, for that, at the time that it was levied, the parties to it had no interest, but that, although the fine did not operate, the possession of twenty years by the husband, against the party entitled to the estate on the death of the wife, barred the ejectment.

But there is another case, *Doe d. Souter v. Hall (b)*. There a testator made his will in 1788, by which he left the property to his wife, for her life; she and her youngest son, who was supposed to be entitled to the reversion, joined in conveying the estate to

(a) 2 Ad. & Ell. 14.

(b) 2 Dowl. & RyL. 38.

a stranger; and the heir-at-law, who was really entitled, afterwards made a will, and devised the property to the lessor of the plaintiff. The dates are not given clearly in the report, but I collect that twenty years had not elapsed since the death of the widow, the tenant for life. The objections were, that the possession was adverse, that there was a descent cast, so as to prevent the present plaintiff from bringing ejectment, and that, the plaintiff's testator having been out of possession so long, and the lands being held adversely, he could not convey by will a right of entry which was a mere claim to property adversely held, and therefore came within the provisions of the old statutes against champerty and maintenance; but the Court held that the person in possession was only tenant at sufferance, referring to a passage in *Co. Litt.*, 240 b, which lays down that a man is tenant at sufferance, who entering by right continues to hold the possession over. In this case, should neither party give any further evidence on the point, it may become our duty to decide which of the two cases to which I have referred governs the present; but having regard to the period of the trial at which this question was raised; namely, after the jury had retired, and that neither party required the Judge to leave any question to the jury as to whether Walsh's possession was by the permission of the remainderman or adverse thereto, we are of opinion that we should not bind the parties by what occurred at the last trial, but should direct a new trial, at which the parties will be aware of the materiality, in our opinion, of the question as to the possession having been permissive or adverse, and perhaps may produce evidence on the subject, and either party may call on the Judge to take the opinion of the jury on thereon.

Another question was raised at the trial, which it is necessary that I should refer to. The plaintiff, at the trial, made two cases; one, that which I have referred to, arising from the affidavit made by the defendant in the Incumbered Estates Court; the other, and which was the one principally relied on at the trial was that, in point of fact, the father of the defendant held under a lease for his own life; and, therefore, that he being dead, the plaintiff was entitled to recover. The evidence given by the plaintiff was this. There was

H. T. 1860.
Common Pleas.

EYRE
v.
WALSH.

H. T. 1860.
Common Pleas.

EYRE
v.

WALSH.

no original evidence of this lease or of a search for it, nor had any notice to produce it been served; but the plaintiff relied on an affidavit of registry sworn in 1829, by the then Walsh, who, at that time, was proved to have been in possession, and to have resided on the premises in question. The affidavit was in the form provided by the 10 G. 4, c. 8.—[His Lordship read the affidavit.]—The plaintiff contended that this was a lease for the life of the tenant. The affidavit does not state so, but merely states a lease. But they make it out in this way—from an entry in the registry-book of the Clerk of the Peace, containing the names of the parties, the place of abode, the date of, and lives in the lease. The Clerk of the Peace filled the column with the life of James Walsh, and I suppose that it was assumed that it was the same James Walsh; and the question is, whether the Clerk of the Peace having made an entry that the premises were held by James Walsh for his own life, that entry is evidence against J. Walsh that the lease was for his own life?

It is necessary to consider how the law stood as to the duty of the Clerk of the Peace in relation to the registry-book. The 45 G. 3, c. 59, requires the affidavit of registry to contain the date and the particulars of the lease, and the life or lives for which the property is held. Therefore the affidavit at that time contained the lives in the lease. Section 3 enacts that every such lease shall be indorsed, at the time, in open Court, by the acting Clerk of the Peace, with his name, and the day of the month and year, and the Clerk of the Peace shall then and there compare that lease and indorsement with the affidavit of registry; and he shall, within ten days from the date of the registry, enter in the book of registry the date of the lease, the names of the parties to it, and of the life or lives for which the property is held. So that, under the provisions of 45 G. 3, c. 59, the Clerk of the Peace had two duties to perform; first, to compare the affidavit with the lease produced; and, secondly, within ten days to enter the date of the lease, and the names of the parties, and the lives, in his book of registry. The fact of it being necessary to do it within ten days shows that he was to make the entry, not from the original lease, which was the

property of the voter, and was, of course, returned to him, but from the affidavit, which was to remain among the records of the county, his book being a transcript of the affidavit. That being so, the 10 G. 4, c. 8, proceeded to give a new form of registry. Among the matters to be previously ascertained was the date of the lease and lives, which was to be done from the affidavit, which remained in the custody of the Clerk of the Peace. By 10 G. 4, c. 8, s. 7, the duty was thrown upon the Assistant-Barrister, for the first time, of ascertaining the title of the party seeking to be registered. He had to examine the lease or instrument produced, and to satisfy himself that the party had a proper title. Under section 8, the Assistant-Barrister had to adjudicate thereon, and the party had to take the oath prescribed by the Act; but that oath says nothing about the life or lives for which the property was held; it only speaks of the date of the lease, and declares that the party was a £10 freeholder, in possession, by virtue of the lease. Then comes the 29th section, by which it is enacted, that the Clerk of the Peace is to keep like books, make like returns, and discharge and execute like duties with respect to the registry of freeholds in said county, save so far as is otherwise ordered by the Act; but no responsibility was thrown on him to refer to the original lease; that was the act of the Assistant-Barrister; the Clerk of the Peace was only to see that the affidavit was in the proper form, and he is to make the entry from the affidavit, and not from the deed, and the affidavit does not profess to set out these particulars in the present case. We are, therefore, of opinion that the act of the Clerk of the Peace in this case was extra-judicial, or rather extra-ministerial, on his part; and that he had no right to adopt any form of registry beyond what the Act prescribed. It would be a different thing if the form of registry required a statement that the lease was for the life of a particular party. We are, therefore, of opinion that this evidence was not properly received. It would be a different thing if the Clerk of the Peace had been himself examined as a witness, and had deposed, as a fact, that the lease produced was for the life of the person producing it; this might be very good secondary evidence of the lease, if its loss were first proved, and a notice served on the defendant to

H. T. 1860.
Common Pleas.

EYRE
v.
WALSH.

H. T. 1860.
Common Pleas.

BYRE
v.
WALSH.

produce it. If this had been the only ground for the order for the new trial, we probably would have been of opinion that the verdict was not against the weight of evidence; and that if the plaintiffs wished to rely upon the registry, they should look for and produce the original lease itself, indorsed by the Clerk of the Peace, which would show whether Walsh really registered out of the premises now in dispute, or, as suggested by the defendant, out of other premises. Be this as it may, we grant a new trial, upon the other grounds which I have stated: and I have referred to these latter points in order that, at the new trial, the parties may be aware of the views we take of the entire case. On the question of costs, we are of opinion that the costs of the last trial should be part of defendant's costs in the cause, and that there should be no costs of the new trial motion.

Rule accordingly.

M'LESTER v. QUINN.

Jan. 14.

In a personal action, brought to recover penalties under the Corrupt Practices Prevention Act (17 and 18 Vic., c. 102), the Court will order the plaintiff to give security for costs, where it is sworn, and not contradicted, that the plaintiff is a pauper, that he has been put forward by third parties for an ulterior purpose, and that the defendant has a good and substantial defence on the merits.

THIS was an application to compel the plaintiff to give security for costs. The defendant's affidavit, upon which the motion was founded, stated that the present action was brought against him to recover penalties, on the grounds of bribery, treating, and undue influence, alleged to have been committed at an election for the return of a Member of Parliament for the Borough of Newry, in May 1859, when the defendant was returned as a burgess to serve in Parliament for that Borough. The affidavit proceeded thus—"And
"deponent saith, that he has a good and substantial defence to this
"action, on the merits, and has not the slightest doubt of obtaining a
"verdict therein. For this deponent saith that he did not directly
"or indirectly give or offer or promise any money or valuable con-
"sideration to any person, in order to induce such person to vote
"or refrain from voting, or to do any other act declared to be bribery,
"treating, or undue influence, by the statute in that behalf." It

further stated the defendant's belief that the plaintiff was a very poor man, and wholly unable to pay the costs which the defendant must incur in defending the action; that three other actions had been brought for penalties under the same statute (the Corrupt Practices Prevention Act 1854), last Term, against persons who had voted for the defendant; in one of which actions, the plaintiff in that action, when called to give evidence, declined to do so, unless he should be paid his expenses; that he has been informed and believes that not only the plaintiff in this action, but also the plaintiffs in the other actions are poor men, and have been put forward by those interested in disputing the defendant's election to bring actions, nominally for penalties, but really, if possible, to extract information to be used against the defendant, in prosecuting the election petition lodged by them against him; and at no peril of costs to themselves, in case they should fail to succeed.

H. T. 1860.
Common Pleas.
M'LESTER
v.
QUINN.

No affidavit was filed by the other side controverting these statements.

Macdonogh, in support of the application.

The fact of the plaintiff being put forward for a purpose altogether different from that for which the action is ostensibly brought is sufficient to carry this motion; but besides that, the plaintiff is admittedly a pauper.—[CHRISTIAN, J., referred to *Rice v. The Dublin & Wicklow Railway Co.* (a); *Sheehan v. Dorman* (b).—MONAHAN, C. J., referred to *Egan v. Kircaldy* (c).]—The authorities referred to establish the Common Law power of the Court in such cases; which is in addition to the extraordinary powers conferred by section 24 of the Corrupt Practices Prevention Act.—[KEOGH, J. It may be a question whether or not the fact of bringing this action for the avowed purpose of obtaining information, there being a petition at present pending before the House of Commons in reference to the same facts, would not be regarded as a breach of privilege.]

(a) 8 Ir. Com. Law Rep. 155.

(b) 2 Fox & Sm. 338.

(c) 3 Ir. Law Rep. 547.

H. T. 1860.
Common Pleas.

M'LESTER
v.
QUINN.

Heron, contra.

The authorities referred to apply only to cases where the real plaintiffs, who were not parties to the action, derived an immediate and actual benefit from the action. Where the plaintiff suing is insolvent the rule may also apply.

But first, the Court will not stay a *qui tam* action upon a motion of this nature; and secondly, there should have been a *general* affidavit of merits.—[CHRISTIAN, J. I conceive that the affidavit is sufficient.]—The poverty of the plaintiff is not a sufficient ground.—[MONAHAN, C. J. Not if the action be *bona fide*.]—The Corrupt Practices Prevention Act confers no additional powers upon the Court; it is merely declaratory of their Common Law power of giving security for costs.—[CHRISTIAN, J. Is it denied that there are other parties behind the scenes, carrying on this action?—It is not denied; but security for costs is never given in *qui tam* actions: *Foster v. Roundel* (a); *Gregory v. Elvidge* (b). The mere fact of a person being put forward as plaintiff in an action is not a sufficient ground for security for costs: *Hearsey v. Pechel* (c); *Armitage v. Grafton* (d).—[CHRISTIAN, J. The special clause in the Act seems intended to meet such cases as the present.]

He also cited *The Queen v. Malmsbury* (e); *Rogers on Elections*, p. 377.

Law, in reply.

If an action be brought by a tenant, in which the landlord be really the party interested, the Court will order the plaintiff to give security for costs: 2 *Arch. Prac.*, p. 1352, citing *Tenant v. Brown* (f).—[CHRISTIAN, J. Is there any case presenting a two-fold aspect, viz., being as to part *bona fide*, and as to part *mala fide*, in which security for costs was ordered?—All cases where a penalty may be recovered must be to a certain extent *bona fide*. The case of

(a) Wil., Vol. & Dav. 58.

(b) 2 Cr. & Mee. 336; S. C., 2 Dowl. Pr. Cas. 259.

(c) 5 B. N. C. 466.

(d) 10 Jur. 377.

(e) 9 Dowl. Prac. Cas. 359.

(f) 5 B. & C. 208.

The Queen v. Malsbury does not apply ; it refers to *mandamus* ; and in such a case the Court will not interfere with matters of public right.—[KNOGH, J., referred to a preceding section in the statute, providing security for costs in cases of indictments.]

H. T. 1860.
Common Pleas.
M'LESTER
v.
QUINN.

Cur. ad. vult.

MONAHAN, C. J.

'This is an application to stay proceedings until the plaintiff gives security for costs. The motion is founded upon the affidavit of the defendant, who states that he was returned as Member of Parliament for the Borough of Newry, in the month of May 1859, and that the present action has been commenced against him to recover penalties, on the alleged grounds of bribery, treating, and undue influence, at that election, incurred under the provisions of the Corrupt Practices Prevention Act. He says that he has "a good and substantial defence to this action, on the merits, and has not the slightest doubt of obtaining a verdict thereon; for this deponent saith that he did not directly or indirectly give or offer or promise any money or valuable consideration to any person, in order to induce such person to vote or refrain from voting, or do any other act declared to be bribery, or treating, or undue influence, by the statute in that behalf."

This affidavit has been objected to on the part of the plaintiff, as not being in substance an affidavit of merits; and it has been made the subject of some verbal criticism, to which we do not think it is properly liable. We think affidavits, like other documents, should receive a reasonable construction, and that it should not be assumed that the party making an affidavit means to evade. I have no doubt the meaning of the affidavit is this—I have a good defence upon the merits; and I did not give money or valuable consideration to anyone, either to induce him to vote or abstain from voting; nor have I done any other act which would bring me within the provisions of the Corrupt Practices Prevention Act, under which this action has been commenced.

We must, therefore, regard this affidavit as containing an absolute statement that the defendant has not contravened the Act of

H. T. 1860.
Common Pleas.
M'LESTER
v.
QUINN.

Parliament in any way. After stating that he believes that the plaintiff is unable to pay the costs which must be incurred in this action, he proceeds to state that three other actions for penalties, under the Corrupt Practices Prevention Act, have been brought against three persons who voted for the defendant, in one of which the plaintiff (in that action) had refused to give evidence unless his expenses were paid. He then states that he has been informed, and believes, that in fact not only the said H. M'Lester, but also the plaintiffs in those other actions, are persons in indigent circumstances, and have been put forward by those interested in disputing his election, to bring actions nominally for penalties, but really for the purpose of obtaining information to be used against the defendant in prosecuting an election petition lodged against him, and at no peril, as to costs, to themselves. It is upon this part of the affidavit that we found our judgment, as we must take the statement so made by the defendant to be admitted, there being no denial of it by or on the part of the plaintiff. That being so, for anything we know to the contrary, the plaintiff's name may be used by others in this action, *solely* for the purpose and with the object of obtaining evidence to be used on the election petition; though I think also it may be tolerably certain that, if the plaintiff should recover penalties in this action, he will put the amount into his pocket; but we cannot consider that this action has been brought by the plaintiff for the *bona fide* purpose of recovering such penalties. If this case had arisen before the passing of the late Act (17 & 18 *Vic.*, c. 102), we should have had to consider whether we had jurisdiction to make the order sought for in *qui tam* actions. It would be now quite useless to consider that question; as if any doubt ever existed on the subject, for which, I confess, I see no grounds, all such doubts have been removed by the provisions of the Corrupt Practices Prevention Act, s. 24, which provides that, in any action to recover a penalty under that Act, it shall be lawful for the Court in which the action is brought, or any Judge thereof, if they or he shall think fit, to order that the plaintiff in such action shall give security for costs, or that the proceedings in the action shall be stayed. It is not for us to say why the Legislature introduced this clause. It may have

been suggested that there existed a greater difficulty in this respect, as regarded *qui tam* actions, than in other cases; or they may have intended to give the Court a more extended jurisdiction in those than in other cases. Other cases may arise, in which it may be necessary to consider particularly the effect of the provisions in the recent Act. This case we decide on its own special facts, viz., a clear affidavit of merits; the inability of the plaintiff to pay defendant's costs, a statement, uncontradicted, that the action, although nominally brought to recover penalties, was really brought by other parties than the plaintiff, for their own purposes, and for and with the object of eliciting information for another and altogether different purpose.

A case has been referred to by my Brother CHRISTIAN upon this subject, *Sheehy v. Dormer* (a); and there was another case in the Court of Exchequer, *Egan v. Kircaldy* (b). In both of these cases the plaintiffs were really interested in the subject-matter; but because it was really brought by other parties, for the purpose of trying a right in which those other parties were interested, who put forward the plaintiff for the purpose of protecting themselves from payment of costs, in case the other side should succeed, security for costs was ordered to be given. This case may be distinguishable from those I have referred to, as not involving any question of right in a third party; but, on the whole, we have no doubt that, under the circumstances of this case, we should order the proceedings in this action to be stayed until the plaintiff give security for costs.

BALL, J.

I felt considerable doubt, during the argument, as to whether this case came within the authorities for obliging plaintiffs to give security for costs. It is settled that the single circumstance of a pauper being plaintiff in a *qui tam* action will not, without more, oblige him to do so. The persons by whom such actions are brought may be expected to be, as they generally are, in needy circumstances; and it would be defeating the policy of the law which authorises and encourages the bringing of such actions, to prevent their being proceeded with except upon the terms of the plain-

H. T. 1860.
Common Pleas.
M'LESTER
v.
QUINN.

(a) 2 F. & Sm. 238.

(b) 3 Ir. Law Rep. 542.

H. T. 1860. *Common Pleas.* tiffs therein giving security for costs, whenever they happen to be in indigent circumstances. But there are numerous instances where plaintiffs, though not liable to give security for costs, on the single ground of their being paupers, have been compelled to do so when, in addition to that circumstance, they have been put forward by third parties, to try rights in which the latter are interested, and which they seek to have decided without risking the costs of the action; or when the action is really and substantially the action of third parties, and not of the pauper plaintiff on the record. Upon such grounds the case of *Shoeky v. Dormer* (a) was decided in the Queen's Bench in this country, and the case of *Rice v. Dublin and Wicklow Railway Company* (b), in this Court; and other cases, not necessary to advert to upon this motion, have been decided upon analogous principles, as well in England as in this country. Now the motion here is brought forward upon an affidavit of the defendant, wherein he denies positively the charges against him, upon which the action is founded, and states that he has not the slightest doubt of obtaining a verdict therein. He states, further, that the plaintiff is a pauper, and unable to pay the costs of the suit; that three other *qui tam* actions had been brought, upon similar grounds, against persons who had acted for the defendant at the late Newry election, the plaintiff in one of which refused to give evidence unless he were paid his expenses. That he believed the plaintiffs in those several actions had been put forward by interested parties, nominally to recover penalties, but really to obtain information to be used on the hearing of the election petition then pending in the House of Commons.

No affidavit has been made in answer to these statements; and, therefore, I must take it that they could not be denied with truth. Thus we have it apparent that the charges upon which the action is founded are fictitious; that the plaintiff is a mere instrument in the hands of other parties, allowing his name to be used for their purposes, and that the action is really brought to obtain information to enable other persons to sustain an election petition, and not with the view or expectation of recovering penalties under the statute;

(a) 2 F. & Sm. 236.

(b) *Ubi sup.*

and finally that the plaintiff, being a pauper, has not the means of paying the costs of the action. Now I have no doubt that a case so circumstanced comes within the principle of the authorities to which I have referred; but I had for some time a difficulty in holding that where, as in this instance, the plaintiff has a substantive cause of action on his own behalf, and in which he alone is interested, and in respect of which, if there was nothing more in the case, he would be at liberty to proceed in the action without giving security, the circumstance of his having also a collateral object in which others are interested, though he himself is not, should oblige him to do so. However, on consideration of the authorities, I am satisfied that the circumstance to which I have just adverted should make no difference in the application of the rule. In the case of *Tenant v. Brown* (a), a pauper plaintiff, who had brought his action of trespass against parish officers, for taking his goods under a distress for poor-rates, was ordered to give security for costs, on the ground that he had been put forward by his landlord (who alone was interested in defeating the rate), to bring the action for the benefit of the latter. It appeared in that case that, in addition to the plaintiff's object, which was to defeat the rate as illegal, for the benefit of his landlord, he had a substantive claim on his own behalf for damages against the officers, for wrongfully detaining his goods several days after the seizure; but the Court held that that circumstance made no difference in the case, and that the action being really and substantially the action of the landlord, they would not suffer it to proceed without security for costs, although the pauper plaintiff had a direct personal interest in prosecuting it on his own behalf. So here I can have no doubt, upon the uncontradicted statements in the defendant's affidavit, that this is really and substantially the action of third persons, and not of the pauper plaintiff; and, accordingly, although he has a direct personal interest in the recovery of the penalties, he cannot proceed in the action, without security for costs.

The case of *Hearsey v. Pechell* (b), which has been relied on by the plaintiff, is clearly distinguishable from the present; and Chief Jus-

H. T. 1860.
Common Pleas.
M'LESTER
v.
QUINN.

(a) 5 Bar. & Cr. 208.

(b) 5 B. N. C. 466.

H. T. 1860.
Common Pleas.
M^rLESTER
v.
QUINN.

tice Tyndal, in delivering judgment, recognises the distinction, which is simply this, that, in the former case, the Court was not satisfied, upon the facts stated, that the action was substantially that of a third person, and not of the plaintiff; whereas, upon the facts stated in the defendant's affidavit in the present case, there can be no doubt that this is the action of third persons, and not of the plaintiff.

For the foregoing reasons, I am of opinion that the plaintiff must give security for costs.

KNOGH, J.

After the observations that have fallen from my **LORD CHIEF JUSTICE** and **Mr. Justice BALL**, it is unnecessary that I should do anything more than express my concurrence. There are, however, one or two matters, alluded to in the course of the argument, to which I wish to refer. Assuming the facts to be as stated by the **LORD CHIEF JUSTICE**, I do not think that there can be any question as to the authority of the Court to compel the plaintiff to give security for costs in the present case, either under its original jurisdiction, or under the provisions of the late Act of Parliament. That statute was framed with the primary object of preventing mal-practices at elections; but while doing so, it provides that its enactments are not to be made instrumental for vexatious purposes. Section 10 enacts that any Criminal Court, in which a prosecution may be brought for offences against the Act, shall award such expenses to the prosecutor as shall appear to be reasonable; and section 13 provides that the payment of such costs is not to be ordered, unless the prosecutor shall previously have entered into a recognizance, with two sufficient sureties, for payment of the costs of the prosecution to the defendant, in case he shall be acquitted. Now there are two methods of proceeding against a party under this Act, by indictment, and by suing for penalties. In the former case, the Legislature has provided that, if a defendant is acquitted, he shall have his costs, and has also provided the means of securing them to him; and why should not the defendant be also secured in his costs in an action for penalties under the same statute? It may be said that he will be awarded costs, if he succeed at the trial; but what will be the value

of such an award if the plaintiff be a pauper, a fact admitted on the affidavits? It is, therefore, a mere delusion in such a case to say that the defendant, if successful, will have his costs; on the contrary, he will lose the whole of what he may have expended in his defence; and the only way by which such a result can be prevented is, by compelling the plaintiff to give security for costs.

It is stated by the defendant that there are three actions now in progress against persons who voted for him, and that he has been informed, and believes, that the object of all these actions is the same, viz., for the purpose of obtaining information to be made use of for another purpose. These statements are uncontradicted by the other side, who do not hesitate to admit that such is the object of the action, although, no doubt, the plaintiff is to get the penalty, if he succeeds. The *result* may be to give the plaintiff the penalty; but such is not the *object* of the action. The real object of this action is, therefore, altogether different from the ostensible motive; and what is that, but a most palpable abuse of the process of this Court? This action must be regarded as brought for the sinister, I would almost say, unconstitutional, purpose of interfering with another tribunal that is about to investigate this case, the Committee of the House of Commons. I am of opinion, for these reasons, that it would be most unjust to the defendant not to make this order upon the plaintiff, in order that the persons behind the scenes may be compelled to come forward, and give security for the costs of the action. I conceive that we have full jurisdiction to make this order, as well originally, as under this Act of Parliament; but even if there were any doubt upon the subject (unless there had been clear authority the other way), I, for one, would feel disposed to make a precedent in the present case.

CHRISTIAN, J.

I should not have thought it necessary to add anything to what has been said by the other Members of the Court, were it not that I am disposed to lay somewhat more stress upon the powers in the 24th section of the statute than I think they have done. I am the more inclined, if I can, to rest the order upon that, because

H. T. 1860.
Common Pleas.

M'LESTER
v.
QUINN.

H. T. 1860. it appears to me to be not expedient to add unnecessarily to the
CommonPleas.
M'LESTER
v.
QUINN. precedents in which, on grounds applicable to the ordinary jurisdiction of the Court, the actions of poor plaintiffs have been obstructed by ordering them to give security for costs. Now I think we must presume that the Legislature, when it inserted this proviso, intended that it should have some practical operation. Mr. *Heron* contended that its effect was only to confer upon the Court, in the actions given by this Act, the same power which it possessed in other actions. But it appears to me that, for that purpose, the clause would have been wholly unnecessary. The cases which were referred to during the argument show that, in *qui tam* actions, the Court always possessed the same power of ordering security for costs which it had in other cases; and I think that, when a new action is given by the statute, it becomes (in the absence of any special direction) simply a new subject-matter, brought under the ordinary procedure and control of the Court. Without the clause in question, therefore, the Court would have had the power of dealing with this motion on the ordinary grounds; and I am far from intending to intimate a doubt that it might, upon those grounds, have been exercised, for the reasons and upon the authorities referred to by my LORD CHIEF JUSTICE. But here is a very express enactment that, in any action for a penalty under the Act, it shall be lawful for the Court or a Judge, *if they or he shall think fit*, to order security. The limitation is indicated as to the grounds on which this discretion should be exercised; and I confess it appears to me that the intention was to enlarge the power of the Court in dealing with a new class of actions, which were capable of being perverted to furtive and sinister objects and to the persecution of individuals. Then, if such be the object of the clause, I ask to what case it can possibly have application if not to this? Here is an action in which a penalty *may* be recovered, and which, if recovered, will belong to the plaintiff. But it is conceded on this motion that that is mere pretence. It is not the person whose name is used here as plaintiff who has brought this action at all: he has never claimed it as his; he has made no affidavit, and the Counsel who opposes this motion cannot venture to state

that he is instructed by him. The plaintiff and the penalty are both avowedly fictitious, and the real suitors here are certain political opponents of the defendant, who are using the process of this Court, under colour of an action for penalties, to extort from the defendant a discovery which is to be used before a Committee of the House of Commons, in aid of a petition to unseat him. Now this is not a motion to stay absolutely the action, upon the ground that it is an abuse and perversion of the process of the Court; I say nothing as to what might be the fate of such an application: but this is an application merely to oblige the promoter or promoters of the action (the plaintiff being admittedly a pauper) to give that amount of guarantee of the reality of the proceeding, which is afforded by giving security for the costs of it; and I am clearly of opinion that the clause may as well be struck out of the Act of Parliament, if we refuse to apply it to a case like the present.

Rule accordingly.

H. T. 1860.
Common Pleas.

M'LESTER
v.
QUINN.

BOYD v. NETHERY.

Jan. 19, 20,
31.

Dowse moved to set aside the judgment marked in this cause, which was an action upon an award; upon the grounds, first, that the judg-

The meaning of the provision of section 43 of the Common Law Pro-

cedure Amendment Act 1853, that the time for the appearance and defence to a summons and plaint, by a defendant resident within the jurisdiction, where the writ has been regularly filed, shall be twelve clear days from day of the service, exclusive of holidays, is, that the defendant shall have the day of service and twelve days following, exclusive of holidays, for filing his defence. Hence, where a writ was served upon Thursday the 17th of November 1859, and the plaintiff, on the 2nd of December following, marked judgment by default, no defence having been filed in the meantime, and no holidays except the two Sundays having intervened—*Held*, that such judgment had been regularly marked.

Before the time for pleading had expired, the defendant served a notice on the plaintiff, under section 64, for the production of a document, and, two days later, served a notice of motion to the same effect, not moveable, according to the course of the Court, until the time for pleading had expired. Before the notice could be moved on, the plaintiff marked judgment.

Held, that according to the true construction of section 64 of the Procedure Act, and General Rule 57, the service of such notice could not in any event operate as a stay of proceedings, and that the regularity of the marking of the judgment was not affected by the motion for the production being subsequently granted.

H. T. 1860.
Common Pleas.

BOYD
v.
NETHERY.

ment had been marked before the time for pleading had expired; secondly, that it was so marked pending a notice of motion for the production of a document. The summons and plaint was served upon Thursday the 17th of November 1859, and judgment was marked upon Friday the 2nd of December. The plaintiff contends that Thursday was the last day to plead; the defendant, on the contrary, alleges that he had the whole of the Friday. On the previous Monday, the 28th of November, a preliminary notice was served by the defendant upon the plaintiff, for the production of the document relied on in the summons and plaint, under section 64 of the Common Law Procedure Amendment Act 1853, and to caution him against proceeding in the meantime. No reply having been sent, a notice of motion, for the first opportunity of moving same in Chamber, was served on Wednesday the 30th, which was not moveable until after the time when the judgment was marked. At seven o'clock on the Thursday, after Mr. Sweeny, the defendant's attorney, had left his office, and no person was there, a reply was received from the opposite side, to the effect that if the defendant did not plead within the usual time, judgment would be marked; and it was accordingly marked on the following morning, at the opening of the office. With reference to the first point, that has already been decided, by this Court, in our favour, in the case of *Churchward v. Graham* (a). There it was held, that the defendant had the whole of the twelfth clear day to plead, and, therefore, that he had the entire of the thirteenth, inasmuch as the law takes no account of fractions of days. The defendant's case here ought to be governed by the construction of this Court, as to the law at the time it arose.—[MONAHAN, C. J. We decided that case upon the ground that, where *clear* days are mentioned in an Act of Parliament, the first and last must be excluded.]—Such is the settled rule of law upon this subject. The leading authority is *Lester v. Garland* (b), where Sir W. Grant says, "Our law rejects fractions of a day, "more generally than the Civil Law does. The effect is to render "the day a sort of indivisible point; so that any act done, in the

(a) Not reported, Michaelmas Term, 28th of November 1858.

(b) 15 Ves. 248.

"compass of it, is no more referable to any one than to any other portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed, until the day is passed." *Zouch v. Empsey* (a); *Regina v. Justices of Salop* (b); *Mitchell v. Forster* (c); *Regina v. Aberdare Canal Co.* (d); *Young v. Higgon* (e); *Blunt v. Heslop* (f); *Newman v. Hardwicke* (g); *Robinson v. Waddington* (h). The words of the 43rd section are, "Where the defendant is within the jurisdiction of the Court, the time for appearance and defence to the summons and complaint shall be twelve clear days from the day of service thereof, exclusive of holidays," &c. It is true that the form of summons and complaint says, "Therefore the defendant is required to appear in the said Court, within twelve days after the service hereof," &c., omitting "clear," but this must be supplied from the section. With reference to the second point, it will not be disputed at the other side that we are entitled to the production of this document; and therefore, as our preliminary notice ought to have been complied with, the judgment marked, pending the notice of motion, was irregular. The 64th section of the Act says, that "In case such copy shall not be delivered, or such inspection or production shall not be granted, the party demanding same shall be at liberty to apply to the Court, or a Judge, for an order for such copy, or inspection or production, &c.; but such demand, notice or order, shall in no case operate as a stay of proceedings, except where a special order shall be made by a Judge to that effect." This must be taken in connection with the 57th General Rule, which says that, "Where any party shall have served a notice requiring a copy of any deed or document, he shall have the same time for filing his pleadings, after compliance with such notice, as he had at the time of service thereof." The effect of that is, that if a judgment shall be marked, pending a notice of motion to produce a document, the subsequent granting of that

H. T. 1860.
Common Pleas.

BOYD
v.
NETHERY.

(a) 4 B. & Al. 522.

(c) 12 Ad. & El. 472.

(e) 6 M. & W. 49.

(g) 8 Ad. & El. 124.

(b) 8 Ad. & El. 173.

(d) 4 Q. B. 854.

(f) 8 Ad. & El. 577.

(h) 13 Q. B. 753.

H. T. 1860. motion will render the judgment irregular, as having been marked
Common Pleas. before the extended time for pleading has expired. This appli-
cation did not require an affidavit, as it was not for the discovery
of documents, but only for the production of the document re-
lied on in the summons and plaint. It is not founded on the
55th section of the Common Law Procedure Act 1856, which
refers to the discovery of documents.

BOYD
v.
NETHERY.

R. Armstrong, contra.

With reference to the latter point, the 57th General Rule does not repeal the 64th section. It is only in case the notice be complied with, that the time for pleading is to stop. As to the first point, the 6th General Rule defines that in all cases, where time is not computed by days, "it shall be exclusive of the first and inclusive of the last day. The word "day" must receive the same construction in the 43rd section; and in the form, what is called in one a "clear day," is in the other described as a "day." The defendant, by section 39, must file his summons and plaint within the time specified. The eight days from the notice of filing the summons and plaint, in the second clause of the 43rd section, are not expressed to be clear days; but the same construction ought to pervade it. The two other Courts hold a different construction of the Rule from that which the defendant contends for, and which this Court adopted before the decision in *Churchward v. Graham*.

Dowse replied.

MONAHAN, C. J.

We are, at this moment, not in a state to dispose finally of all the questions discussed in the present argument; but, in any view which we may form of this case, whether the judgment be regular or irregular, we will order that a copy of this document shall be furnished to the defendant; and even though the judgment should, in our opinion, appear to be regular, we shall allow him liberty to plead. At a future day, when we

have carefully looked into this matter, we will dispose of the motion. At present, we shall merely say that, so far as the 57th Rule is concerned, this judgment is regular. The construction of that Rule is, that where notice has been served to produce documents, if that be complied with by the opposite party, before the time for pleading has expired, or judgment marked, the date of the service shall regulate the time which the defendant shall have for pleading; but the words of the Rule were not intended to repeal the 64th section of the Common Law Procedure Act; and so we consider that the judgment, so far, is regular. But the Court has power to set this aside, on any terms they think fit. The other question we are not now disposing of, neither do we pronounce any rule at present about the costs of the motion. We shall accordingly order a copy of this document to be furnished to the defendant, and allow him time to plead, reserving the terms.

H. T. 1860.
Common Pleas.

BOYD
v.
NETHERY.

Cur. ad. vult.

MONAHAN, C. J.

This was an application to set aside a judgment marked by the plaintiff, for want of a defence. The summons and plaint was served on Thursday the 17th of November. On Monday the 28th of November, defendant's attorney served a notice on plaintiff's attorney, requiring a copy of the agreement on which the action was brought, and cautioning him from marking judgment. No answer having been given to that notice, defendant's attorney, on Wednesday the 30th of November, served notice of a motion before a Judge in Chamber, for the then next motion day, to oblige plaintiff's attorney to furnish a copy of the agreement. On the next day, Thursday, plaintiff's attorney served a notice on the defendant's attorney, apprising him that he would not stay his proceedings. It is stated, I believe truly, that this notice was not served till the evening of Thursday the 1st of December; and, at the opening of the office on the following day, Friday the 22nd, plaintiff marked judgment. When the case was originally moved before us, it was relied on by defendant's Counsel that plaintiff had marked the judgment a day too soon, and that the defendant had

Jan. 31.

H. T. 1860.
Common Pleas.

BOYD
v.

NETHERY.

the entire of Friday the 2nd of December to plead; and we were pressed with our decision in the case of *Churchward v. Graham*, in which we certainly held, or at all events expressed our opinion that, under the Common Law Procedure Act, the plaintiff was not at liberty to mark judgment for want of a defence till after the expiration of thirteen clear days from the day of service of the summons and plaint; and, no doubt, since our decision in that case, the practice in the office of this Court has been, not to mark judgment for want of a defence till after the expiration of the thirteenth day, virtually giving a defendant one day more to plead than he would have under similar circumstances in either of the other Courts. In the present case we have been informed by the Master of the Court that he at first refused to permit the plaintiff's attorney to enter the judgment, as he was one day too soon; but plaintiff's attorney having threatened to bring an action against him for not marking the judgment, he thought it better to allow him to mark the judgment at his peril. This motion was moved several days since; and we then decided that whether the defendant's time for pleading had expired or not, as he was acting under our judgment in a previous case, that he should be allowed to plead, which he has done; and we took time to re-consider our judgment in the previous case, and determine whether we should abide by the opinion we expressed in that case, and continue our practice, different from the other Courts, or whether we should alter our practice, and make it conformable to that of the other two Courts.

We have accordingly re-considered the question, which depends altogether on the construction of the 43rd section of the Common Law Procedure Act of 1853, which enacts that where the defendant is within the jurisdiction, the time for appearance and defence to the summons and plaint shall be twelve clear days from the day of the service thereof, exclusive of holidays. In the case of *Churchward v. Graham*, which was before us on the 28th of November 1858, the application was on behalf of the plaintiff, to oblige the defendant to accept short notice of trial, on the ground that the defendant should have pleaded on the day for serving notice of trial for the After-sittings in this Court, but

that the defendant's attorney, in order to prevent the case being tried, had deferred pleading till the opening of the office on the following morning. The Counsel for the defendant in that case insisted he had the entire of the day to plead, on the morning of which he pleaded; and the facts gave rise to the present question, just as in the present case, whether the party should plead on the twelfth clear day, or whether he had the entire of the thirteenth day for that purpose. We were, on that occasion as on the present, referred to the numerous cases which decide that where, by statute or rule, any matter is not to be done till a certain number of clear days after any other thing, that the specified number of days must be allowed to intervene, irrespective of the first and last days. For instance, in the present case, if the enactment was, that the plaintiff should be at liberty to mark judgment twelve clear days after the service of the summons and plaint, the earliest day on which judgment could be marked would be the fourteenth day, counting the day of service as one; that is, leaving twelve clear days between the day of service and the day of marking the judgment; and in some way or other, which I cannot now understand, we thought, in *Churchward v. Graham*, that the party had the thirteenth clear day to plead. Possibly we then yielded to an argument similar to that used by Mr. *Dowse* in the present case; namely, that the defendant has twelve clear days to plead; that he is entitled to the whole of the twelfth day, but as the office shuts at an early hour in the evening, he has not, in fact, twelve clear days, unless he gets part of the thirteenth; and as the law takes no notice of parts of a day, he must have the entire. Be this as it may, we are now satisfied that our former opinion was unadvisedly formed; and that where a party has twelve clear days to do an act, his time for doing it expires at the end of the twelfth clear day, notwithstanding Mr. *Dowse's* suggestion; and that unless the defendant pleads while the office is open, on the twelfth clear day, the plaintiff is entitled to mark judgment as early as he can on the following day. But I believe the practice of the office is, that if both parties are there at its opening, the defence will be received, and the plaintiff will not be able to get the necessary certificate of his

H. T. 1860.
Common Pleas.

BOYD
v.
NETHERY.

H. T. 1860. defence filed, to enable him to mark the judgment, as for want
Common Pleas. of a defence. Therefore we must hold that the judgment was not
 marked too soon in the present case. When this case was formerly
 before us, we expressed our opinion, to which we adhere, that
 the notice served by the defendant's attorney, requiring a copy
 of the agreement and the notice of motion for that purpose, did
 not operate as a stay of proceedings, so as to render plaintiff's
 judgment irregular. But still, as I have already stated, we were
 and are of opinion that the defendant should be at liberty to defend
 the action, and we have already made a rule to that effect. The
 result of what we have done in this case will be that, for the future,
 the time of pleading in this Court will be the same as in each
 of the others; and the officers of this Court will do everything in
 their power to give publicity to the change in our practice.

BOYD
 v.
 NETHERY.

JACKSON v. CRIDLAND.

Jan. 24, 31.

A separation deed contained the following proviso, "that neither the said wife nor husband shall not nor will, at any time hereafter, institute or commence, &c., any suit, &c., in any Ecclesiastical or other Court, or apply for any Act of Parliament, with a view of obtaining a divorce, upon any ground, or for any cause whatever either now existing, or which may afterwards arise or be conceived to exist; provided always, that in case any suit, &c., shall be instituted, &c., by said H. C. (the wife), then and from thenceforth the said yearly sum or sums hereinbefore covenanted to be paid, &c., shall absolutely cease and determine." The deed also provided, that in the event of the husband taking such proceedings, the wife's annuity should be increased. By the same deed, an annuity was granted to the wife, which was expressed to be "in consideration of the agreement and understanding that she should not, at any time thereafter, molest or disturb the said husband in his person or in his manner of living, nor at any time or times hereafter require, or by any means whatever, by ecclesiastical censures, or by taking out any citation or process, or commencing or instituting any suit whatever, or otherwise howsoever, endeavour to compel him to cohabit or live with her, or to enforce any restitution of conjugal rights, nor require, nor by any means whatsoever endeavour to compel him to allow her, any further or other alimony or maintenance than is allowed by these presents." The wife afterwards brought an action to enforce the arrears of said annuity.—*Held*, that, assuming the proviso in question to be void, on the ground of public policy, as tending to encourage immorality, it did not form any portion of the consideration for the grant of the annuity, and that the action was maintainable.

of the third part, the defendant, for the considerations therein mentioned, covenanted with the plaintiff, that he, the said defendant, should and would pay to the plaintiff, his executors, &c., during the joint natural lives of the said defendant and his said wife, the yearly sum of £100 sterling, subject to be increased as therein mentioned, on the death of Annie Blanche Cridland, who is still living; the said yearly sum to be payable by equal half-yearly payments, on the first day of January and the 1st day of July in every year, &c. Averment, that plaintiff was trustee for Mrs. Cridland, and that ten years' arrears were due, amounting to £784. 4s. 10d.

Second count, on a further covenant, that in case, for any cause whatever, other than the act or deed of the said Henry Cridland, a certain annuity of £300, in said deed mentioned, should cease to be payable, or should be in arrear for two calendar months, so that a certain proviso in said deed contained, whereby time was to be allowed to the said defendant for payment of the annuity of £100, in said first paragraph, until the arrears of the said annuity of £300 should be paid and satisfied, should take effect, then the said defendant would pay to the plaintiff, for the maintenance of his said wife, the yearly sum of £30, by equal quarterly payments; the first payment thereof, in case the same should become payable, or of a proportionate part thereof, in respect of so much of the quarter of a year as should have elapsed from the day of the said annuity of £300 ceasing to be payable, or from the day when the same annuity should have been in arrear two calendar months, to be made on such of said quarterly days of payment as should follow next after such events, or either of them. Averment, that said annuity of £300 did not cease to be payable, yet the same was several times in arrear for the space of two calendar months, so that the said defendant had the benefit of the said proviso, and was not required to make payment of said annual sum of £100, while said annuity of £300 became payable, by virtue of said last recited covenant; that, on the first day of June 1859, the sum of £300 of the said yearly sums of £30 for ten years then elapsed became due.

The defendant, in his defence, set out the deed *in hæc verba*.

H. T. 1860.
Common Pleas.
 JACKSON
 v.
 CRIDLAND.

H. T. 1860. It purported to be made between Henry Cridland, Esq., the defendant, of the first part, Henrietta Cridland, the wife of said Henry, of the second part, and William Oliver Jackson, of the third part.

Common Pleas.
JACKSON
v.
CRIDLAND.

It recited two several marriage settlements, dated 19th of February and 3rd of March 1845, whereby an annuity of £300 per annum was limited to a trustee in trust for Henry Cridland, during the joint lives, until the happening of certain events therein specified, and then in trust for Mrs. Cridland, during her life, to her sole or separate use. It then recited a deed of even date, whereby the plaintiff was appointed in place of the former trustee; that differences had arisen between the husband and wife; that there was issue of the marriage one child only, now of the age of five months; that upon the treaty for the separation, it was agreed between said defendant and his wife, that the said infant should remain in the custody of her father, and be maintained and provided for by him, and that the defendant should, in consideration of the premises, and other the considerations thereafter mentioned, pay the annuity thereafter granted. It then witnessed that, in pursuance of the thereinbefore recited agreement, and in consideration of the agreement and understanding, that she, the said Henrietta Cridland, should not, at any time thereafter, molest or disturb the said Henry Cridland, in his person or in his manner of living, nor at any time or times hereafter require, or by any means whatever, either by ecclesiastical censures, or by taking out any citation or process, or commencing or instituting any suit whatsoever, or otherwise howsoever, endeavour to compel him, the said Henry Cridland, to cohabit or live with her, or to enforce any restitution of conjugal rights, nor require, nor by any means whatsoever endeavour to compel, the said Henry Cridland to allow her any further or other alimony or maintenance than is secured by these presents, the defendant then covenanted that the plaintiff might live separate and apart from him, &c. (using the common form of separation deeds). Then followed the covenant for the payment of the annuity, "for the considerations aforesaid." The deed contained the following proviso; that neither the said Henry Cridland, Henrietta Cridland nor the defendant shall not, nor will,

at any time hereafter, institute or commence, &c., any suit, &c., in any Ecclesiastical or other Court, or apply for any Act of Parliament, with a view of obtaining a divorce, upon any ground, or for any cause whatever, either now existing, or which may afterwards arise, or be conceived to exist. Provided always, that in case any suit, &c., shall be instituted, &c., by said Henrietta Cridland, then and from thenceforth the said yearly sum or sums hereinbefore covenanted to be paid shall absolutely cease and determine; and, in case any such suit, &c., shall be instituted or commenced by the defendant, then and from thenceforth he shall abandon, quit claim and release one moiety of said annuity of £300, in favour of said Henrietta Cridland, and which, in such case, shall be paid to her in addition to the payments of £100 and £30 agreed to be paid, &c.

H. T. 1860.
Common Pleas.
 JACKSON
 v.
 CRIDLAND.

Demurrer, on the ground that the defence does not allege any matter of excuse.

Bond Coxe (with whom was *J. E. Walsh*), in support of the demurrer, contended, first, that the proviso was not invalid, as neither being in contemplation of, nor calculated to encourage, immorality. Secondly, that, if void upon the above grounds, it did not vitiate the grant of the annuity, being a condition subsequent, and forming no part of the consideration. He cited *Wilson v. Wilson* (a); *Gaskell v. King* (b); *Hall v. Palmer* (c); *Cartwright v. Cartwright* (d); *Byrne v. Lord Carew* (e); *Jodrell v. Jodrell* (f); *Brown v. Peek* (g); *Jones v. Waite* (h).

Law and *J. T. Ball*, contra, contended that the proviso was illegal *per se*, and being part of the consideration for the grant of the annuity rendered it void. They cited *St. John v. St. John* (i); *2 Bright on Husband and Wife*, by *Jacob, App., No. 12*;

(a) 1 H. L. Cas. 538; S. C., 5 H. L. Cas. 40.

(b) 11 East, 165.

(c) 3 Hare, 537.

(d) 10 Hare, 630.

(e) 13 Ir. Eq. Rep. 1.

(f) 9 Beav. 45.

(g) 1 Eden, 140.

(h) 5 B. & C. 363.

(i) 11 Ves. 526.

H. T. 1860. *Rogers v. Rogers* (a); *Crewe v. Crewe* (b); *Gilpin v. Gilpin* (c);
Common Pleas. *Barker v. Barker* (d); *Sullivan v. Sullivan* (e); *Walrond v.*
JACKSON *Walrond* (f); *Scott v. Gilmore* (g); *Featherston v. Hutchinson* (h);
v. *Bridge v. Cage* (i); *Macquessen's Practice of the House of Lords*,
CRIDLAND. p. 478.—[MONAHAN, C. J., referred to *Adams* (in Error) v.
Reade (k)].

J. E. Walsh replied.

Cur. ad. vult.

CHRISTIAN, J., delivered the judgment of the Court.

Jan. 31. This is an action upon a covenant contained in a deed, bearing date the 9th of July 1846, by which the defendant covenanted with the plaintiff for payment to him, during the joint lives of the defendant and of Henrietta Cridland his wife, of certain annuities, upon trust, for her separate use, and which annuities, it is averred, are in arrear.

To this action a defence has been filed, which is somewhat peculiar in its form. It avers that the deed in the plaint mentioned is in the words and figures following. It then sets out the deed, *in his verbis*, from the first word to the last, and then merely adds this, "and, therefore, he defends the action." To this defence the plaintiff has demurred.

Upon these pleadings, though the case is, in form, before us on a demurrer to the defence, yet in substance it is before us on a demurrer to the deed, or, to speak more technically, to the plaint. Under the old form of pleading, the defendant, wishing to defend himself in the way he does here, would have craved *oyer* of the deed. When it was set out on the record, in pursuance of that prayer, it would have been considered as a part of the declaration; and the defendant would have demurred to the declaration; and, upon the

(a) 3 Hagg. 57.

(c) 3 Hagg. 153.

(e) 2 Adams, 303.

(g) 3 Taun. 226.

(i) Cro. Jac. 103.

(b) 3 Hagg. 131.

(d) 2 Adams, 235.

(f) 1 John, 18.

(h) Cro. Elis. 199.

(k) 2 Ir. Jur., N. S., 197.

argument of that demurrer, the question would have been, what obviously it is here, whether, in the absence of any averment whatever of matter intrinsic, the deed is, on its own showing, void, so as to be incapable of being made the subject of an action.

H. T. 1860.
Common Pleas.
JACKSON
v.
CRIDLAND.

The deed, which is thus before us *in extenso*, is one of the kind with which Courts, both of Law and of Equity, are now familiar, and which are called separation deeds. The covenant sued on is that by which the husband bound himself to provide a separate maintenance for the wife during the separation. Among the points noted for argument by the defendant were some which seemed to impugn the deed, upon its general frame and object, and also because there is no covenant by the trustees to indemnify the husband against the debts of the wife. These points, however, were properly abandoned at the Bar. It is quite too late now to question the validity (speaking generally) of separation deeds, as regards the proprietary arrangements which they contain, if they are executed after differences have arisen; and, as to the want of a covenant by the trustees, however important that might be in a conflict between the plaintiff and the husband's creditors, it affords no protection to the husband himself. The deed in question is in all respects the ordinary separation deed, with the exception of one very remarkable and unusual clause, the existence of which is what is now alone relied on by the defendant as utterly invalidating and cancelling this deed. The point is well put in the second of the points noted by the defendant, viz., "that, in particular, the clause prohibiting both husband and wife from not only any suit in the Ecclesiastical Court, but from seeking a divorce by Act of Parliament, for any cause, tends to encourage immorality, and is in effect a reciprocal license to commit adultery, and, for these reasons, contrary to public policy; and that such latter clause must be taken to be part of the consideration of the deed, and, as such, wholly to vitiate all." Before I read the particular clause, it will be necessary to refer to the previous provisions of the deed.—[His Lordship here read the several provisions in the separation deed, already mentioned in the statement, pp. 378-9].

The question then is, what are the force and operation of the

H. T. 1860.
Common Pleas.
 JACKSON
 v.
 CRIDLAND.

special proviso? and that question resolves itself into two: first, what is the character of the proviso itself? secondly, if it be altogether vicious and corrupt, does that unsoundness work merely its own destruction, or does it go further, and vitiate the entire deed? First, then, with regard to the character of the proviso *per se*, a great deal of criticism was expended upon it, with the view of showing that it does necessarily contemplate or encourage immorality. I (speaking for myself), however, have not any doubt that it does very distinctly contemplate the case of adultery, actual or possible, by one or other, or both of those parties, and that its object, or one of its objects, was to exclude a resort either to an ecclesiastical tribunal, or to the Legislature, for a divorce, for that cause. But then it was strongly argued, by the leading Counsel for the plaintiff, that even this would not make it an illegal clause. Now of course it is quite unnecessary for us to decide that question, if we are of opinion with the plaintiff upon the second of the questions I have mentioned, that is to say, that the viciousness of the proviso (if vicious it be) does not infect the whole deed. Speaking again, however, for myself, I have no hesitation in saying that I think the clause illegal and void. I am sure it would be no defence to a suit in the Ecclesiastical Court for a divorce. I am satisfied that it would not obtain in a Court of Equity an injunction against such a suit, or against prosecuting a divorce bill in Parliament; and I believe that an action at Law could not be maintained upon it. What bearing the Legislature in its wisdom might consider it to have upon an application for a Divorce Act, I have no means of knowing.

Assuming, then (but which, in the view we take of the case, we are not called on to decide), that the proviso is utterly corrupt, illegal and void, I now come to the second of the questions I have stated, is it merely bad in itself, or does it vitiate the whole deed? With regard to the law applicable to this part of the case, there was not, as there could not be, any controversy. On the defendant's part it was admitted that, if this be a separable clause, its vice and consequent nullity affect only itself. On the plaintiff's part it was not disputed that if it be the consideration, or a part of the consider-

ation of the deed, the whole is tainted. The question, therefore, is not one of law, but of construction, or of fact, is this proviso nothing more than a proviso, a thing separate or separable? or does it pervade the whole frame-work of the instrument, as a part of its consideration?

H. T. 1860.
Common Pleas.
 JACKSON
 v.
 CRIDLAND.

That question was differently argued by the two learned Counsel for the defendant. Mr. *Law* argued strictly and closely upon the construction of the deed. Mr. *Ball* repudiated so narrow a limit, and insisted that, whatever be the wording of the deed, we cannot but see that the condonation or license of adultery, either committed or contemplated, was the real motive, purpose and consideration for which it was executed; and he took us through a very wide range of argument, going back to the rudiments of the law of separation deeds, and insisting that we ought to deal with this case according to those opinions and doubts which were thrown out by Lord Eldon, in *Lord Westmeath's case*, and elsewhere, but which have not been since adopted as law, as applied to ordinary separation deeds. We are, however, of opinion that the grounds on which Mr. *Law* has argued the case are those which alone are legitimately open upon the present record. If there were any ground for the suggestion that, whatever be the consideration expressed upon this deed, there was in fact existing outside it another different or additional consideration, that should have been (as it might have been) averred in the defence, and an issue in fact might have been taken upon it. But this is, as I began by observing, in effect a demurrer to the deed. We cannot regard anything but what is on the face of the deed; and the question is simply what, on the construction of the deed, was the *consideration* for the defendant's covenant to pay the separate maintenance? Was the obnoxious clause a part of it? Now, were the case brought to that, it is really free from all difficulty. We know the part of a deed in which to look for its consideration. There are in this deed two *testatum* or witnessing parts. The second is the one upon which the action is brought; but the consideration there expressed is merely "the consideration aforesaid;" and, therefore, to find what the consideration is, we must go back to the former witnessing part. What we there find is

H. T. 1860.
Common Pleas.
 JACKSON
 v.
 CRIDLAND.

as follows:—"Now this indenture witnesseth that, in pursuance of
 "the *hereinbefore recited* agreement, and for carrying the same into
 "effect, and *in consideration of the premises, and also in consid-*
 "*ation of the agreement and understanding* that the said Henrietta
 "Cridland shall not, at any time hereafter, &c., molest or disturb
 "the said Henry Cridland," or sue him for conjugal rights, he,
 the said Henry Cridland, covenants, &c. The premises are
 thus incorporated in the consideration clause. What then are the
 premises? They recite that differences have arisen; the agreement
 to separate; that there is issue one child only, of the age of five
 months; that it was agreed that the child should remain in the
 custody of her father, and be maintained and provided for by him;
 and "that the said Henry Cridland should, in consideration of the
 premises, and other the *considerations* hereinafter mentioned," pay
 the yearly sums thereafter specified, &c., &c. Incorporating, then,
 these recitals into the consideration clause, it is obvious that the
 expressed considerations for the husband's covenant to pay the
 annuities are the following, and none others:—first, the agreement
 to live separate; second, the agreement that the husband should
 have the custody of the child; third, the agreement and under-
 standing that the wife should not sue for the restitution of conjugal
 rights. It was argued for the defendant that the words "other the
 considerations hereinafter mentioned" incorporated as part of the
 consideration all the subsequent clauses of the deed. But it will be
 observed that the words are not "other the *clauses and covenants*
 hereinafter mentioned," but other the "*considerations* hereinafter
 mentioned." The reference is, therefore, fully satisfied by the other
 consideration expressed in the consideration clause, viz., the agree-
 ment and understanding not to molest or disturb, or sue for conjugal
 rights. It follows that the obnoxious provision is not a part of the
 expressed consideration.

Then the way the case stands is thus:—The deed expressed its
 own consideration in language which does not include this clause.
 There is nothing in the nature of the clause itself which requires
 that it must be understood as inserted in or part of the considera-
 tion. There is no averment that in fact it was so. We can only

then regard it as a *proviso*, properly so called—a condition subsequent, which, if valid, would, when violated, have annulled the grant, but which, being void, simply leaves the grant absolute; or a covenant, on which, if valid, an action would have lain, but the invalidity of which has no further effect than to preclude the maintenance of such an action.

I may observe that it is a thing familiar in these separation deeds, that they contain certain clauses which the law will not enforce; for example, the commonest of all clauses, the covenant not to sue for restitution of conjugal rights. That clause the Ecclesiastical Court will totally disregard. A Court of Equity would, I apprehend, as intimated by Lord St. Leonards, in *Wilson v. Wilson* (a), refuse an injunction upon it; and I am not aware if it has ever been held that an action would lie upon it in a Court of Law. But, nevertheless, Courts both of Law and Equity will enforce the proprietary arrangements of the deed, notwithstanding the existence of these clauses.

The defendant has deliberately entered into a contract by which, for considerations sanctioned by law, he bound himself to restore to his wife, in the shape of separate maintenance, a portion of the property which he obtained with her; and notwithstanding the anxiety with which he is now actuated for vindication of the principles of public policy and morality, we think those principles, if in danger at all, would be sufficiently guarded by holding the obnoxious proviso to be void, without giving to it the additional effect of entirely absolving this gentleman from his contract.

We are therefore of opinion that the demurrer must be allowed.

(a) 5 H. of L. Cas. 61.

H. T. 1860.
Common Pleas.

JACKSON
v.
CRIDLAND.

H. T. 1860.
Common Pleas.

RUBENSTEIN v. ———

Jan. 29.

A practising barrister, who had been attending in the Hall of the Four-courts, and had there received a brief in a case, set down for hearing upon that day, but which, prior to his receiving the brief, had been postponed till the next day, was arrested, while returning homewards, on the same day.—*Held* (*dubitantibus* BALL and CHRISTIAN, JJ.), that he was entitled to be discharged from arrest, on the ground of privilege.

THIS was an application to discharge from custody the defendant, a practising barrister, on the ground of privilege. The motion was founded upon the affidavit of the defendant, which contained the following statements:—That on or about the hour of half-past four, P.M., on the 25th of January 1860, he was arrested on Ormond-quay, while he was returning from the Four-courts, where he had been attending his professional duties; that he was returning homewards by the most direct course; that in the early part of the day upon which he was arrested, he had received from a solicitor a brief in a cause which was in Master Litton's list for hearing for that day, but which previously to the defendant's getting his brief, had been postponed until the following day, the respondent not appearing, and the petitioner not wishing to proceed in his absence; that the cause was adjudicated upon on the following day; that the solicitor gave him, and he received, the brief, without any collusion or intention to avoid arrest, as he did not, at the time, apprehend such arrest.

Golding, in support of the application, submitted that, as a barrister, when going to or while on Circuit, was privileged from arrest, he was equally privileged when attending the Superior Courts, there being no distinction, that could be suggested, between the Circuit and the Superior Courts; and that barristers, while on Circuit, are privileged from arrest, was clearly established by the cases referred to in *Hippesley's case* (a); *The Case of The Sheriff of Oxfordshire* (b); *The Case of The Sheriff of Kent* (c); *Reynolds v. Newton* (d). In *Dubois v. Wise* (e), the Chief Baron was clearly

(a) 1 H. Bl. 636.

(b) 2 Car. & Kir. 200.

(c) *Ibid*, 198.

(d) 1 G. & D. 154.

(e) 8 Ir. Jur. 160.

of opinion that the privilege extended to the Superior Courts. In *Newton v. Constable* (a), it was decided that the privilege did not apply to the case of a barrister returning from attendance at Sessions; but throughout the case the privilege seems to have been admitted, when a barrister attended the Superior Courts; and the observations of Lord Denman in that case must be taken *secundum subjectam materiem*. Counsel also referred to 1 *Arch. Prac.*, p. 735.

H. T. 1860:
Common Pleas.
RUBENSTEIN
v.
—

J. Murphy, contra.

It is necessary that a barrister, claiming the privilege of freedom from arrest, should be under an actual professional engagement at the time. It is not sufficient that he be merely on the look out for business.—[CHRISTIAN, J. Is any distinction drawn in the cases, between *Nisi Prius* and the Superior Courts, as to this privilege?]—It is admitted that no such distinction has been laid down. He cited *Ex parte Cobbett* (b); *Philips v. Pound* (c).

Golding was heard in reply.

Cur. ad. vult.

MONAHAN, C. J.

This is an application made to us, exercising the summary jurisdiction of the Court, to discharge from custody a barrister who has been arrested, and who alleges that he is entitled to be discharged from arrest, on the ground of privilege. It appears that the plaintiff in this case obtained a judgment against him for £30 or £40, and issued execution. The defendant states, in his affidavit, that upon the day on which the arrest took place, he left his home, to attend the Hall of the Four-courts, in the ordinary discharge of his professional duty as a barrister. It appears that when he left home, he had no actual brief for the purpose of attending professionally in any case; but in the course of the day, he was instructed by a solicitor to appear in one of the Masters' offices, in a case

Jan. 31.

(a) 2 Q. B. 157.

(b) 26 Law Jour., Q. B., 293.

(c) 21 Law Jour., Exch., 277.

H. T. 1860.
Common Pleas.
 RUBENSTEIN
 v.
 —

then pending in that office; but before he received the brief, the case had been adjourned to the following day, and he was proceeding homeward when he was arrested. The question therefore is, whether we can discharge this gentleman from arrest, he not having left home to attend in any particular case then pending? in other words, are we bound to discharge a gentleman of the Bar, attending in the Hall of the Four-courts, *bona fide*, for the discharge of his professional duties, and there arrested, although, at the time of his attendance or arrest, he was not employed, or even retained, in any case then pending? Several cases have been referred to as bearing on this question; one of the earliest authorities is *Meekins v. Smith (a)*. That was not the case of a barrister, but raised the question of the privilege of a person attending to give bail; and it was proved in that case, that the applicant was not in attendance for the purpose of giving bail, and that the giving of bail was a mere sham; but it was distinctly laid down, that if he had been *bona fide* attending although voluntarily, for the purpose of giving bail, he would have been entitled to his discharge. It is stated, in the report of this case, that several cases were mentioned, of barristers having been discharged from custody, who were arrested on Circuit; and in a case in 1 *Mau. & Sel.*, p. 688, this privilege is stated to have existed by prescription—the meaning of which is, that it was a privilege of early date, and established by the Common Law. Two cases have been referred to in 2 *Car. & Kir.*—one of them, *The Sheriff of Oxford's case*, an old case before Mr. Justice Abbott and Baron Richards, p. 200, decided in the year 1816; and *The Sheriff of Kent's case*, p. 198, before Lord Denman, in which he recognised the authority of the preceding case. Without going at length into the facts of those cases, it is sufficient to say, that very eminent Judges have decided that a barrister, attending Circuit, for the purpose of rendering his professional services to those who may require them, is protected from arrest, from the beginning to the end of the Circuit, although he may have left the Assize town and returned to his private residence. Lord Tenterden, a very high authority, subsequently laid down the law as such, in the case of

(a) 1 H. Bl. 636.

barristers going Circuit, although no retainer existed at the time of the arrest. These authorities show that the privilege is not confined to the cases of barristers actually retained or employed in business. It was decided in *Newton v. Constable* (a), that such a privilege did not exist in the case of a barrister attending Sessions for the purpose of rendering his professional services. Such a distinction between the Superior Courts and the Sessions Courts may probably be founded on this, that in the former barristers alone can practise, whereas solicitors can practise in the other. But the only question in the present case is, whether there is any distinction, as regards privilege, between barristers practising in the Four-courts and on Circuit? Cases have been decided by so many Judges, as to the privilege of a barrister on Circuit, that we cannot take it on ourselves to overrule them; and, therefore, we called upon the Counsel who resisted this application to point out the distinction, if any, between the Four-courts and Circuit, in this respect; but, although Counsel on both sides have referred to all the cases on the subject, no distinction has been suggested. Under these circumstances, upon such an application as the present, when our decision is final, we do not think that we would be justified in refusing this gentleman his discharge, though I confess I entertain some doubts if the question arose in a more solemn way, namely, in an action, as it did in the case of *Newton v. Constable*, whether the final result would be the same. But though we discharge the defendant, it must be on the terms of his bringing no action.

H. T. 1860.

*Common Pleas.*RUBENSTEIN
v.

BALL, J.

I do not dissent from the rule pronounced by the LORD CHIEF JUSTICE; but, nevertheless, I confess that I entertain very grave doubts as to whether the Court should discharge this gentleman upon the ground of privilege. As to the discharge of a barrister, when arrested while attending upon Circuit, there can be no doubt that such is his privilege. In practice, we are all aware that it is constantly done; and, although the cases cited at the Bar are deci-

(a) 2 Q. B. 157.

H. T. 1860.
Common Pleas.
 RUBENSTEIN
 v.
 —

sions by single Judges on the Circuit, and, as far as I know, have never been established by any judicial confirmation of the Courts above, they are uniform in favour of the privilege. But no case has been adduced of the discharge of a barrister from arrest while attending the Courts in Dublin or at Westminster, and not engaged in business, but only hoping for it, on the single ground of privilege. Neither has any legal principle been relied on, warranting the Court to deprive the execution creditor of his remedy against the person of his debtor, being a barrister, save in the excepted case of his attending on Circuit. I am not satisfied that a barrister's attendance on Circuit, and in the Courts in Dublin or Westminster, is in principle the same, in reference to this question of privilege from arrest. I can conceive that the inconvenience and loss to be experienced by suitors, by reason of the arrest of their Counsel, who may have come on Circuit fully prepared in their case, and whose services could not at that moment be adequately replaced by others, may have led to the introduction of the privilege of barristers from arrest on Circuit; the reasons for which would not apply to the Courts in Dublin or Westminster. I am not satisfied either that further distinctions in principle might not be pointed out between the two cases; and, upon the whole, though I am not sufficiently clear upon the point to feel warranted in dissenting from the rule of the Court, I cannot say that I feel satisfaction in abiding by it.

KEOGH, J.

I fully concur in the judgment of the LORD CHIEF JUSTICE, and I cannot say that I entertain any doubts, such as have been expressed by my Brother BALL. It is clearly decided that a barrister attending *Nisi Prius* upon, or, if I may use the expression, off Circuit, and whether engaged professionally or not, is entitled to his discharge from custody upon the ground of privilege. That was decided, by Lord Tenterden (then Mr. Justice Abbott), in the year 1816; and it was followed by Lord Denman, in *The case of The Sheriff of Kent (a)*, in the year 1846. That was a remarkable case. The

(a) 2 Car. & Kir. 197.

barrister arrested had been attending the Assizes at Hertford and Chelmsford, and the business there having terminated on Friday, and the business at the next Assize town not being to commence until the Monday following, he had, in the meantime, returned to his residence in London, where he was arrested, before the opening of the Nisi Prius Commission on Monday; and Lord Denman and Baron Alderson held that he was, nevertheless, entitled to be discharged. The LORD CHIEF JUSTICE has stated that the Counsel who opposed the application was asked if he could draw any distinction between the Four-courts and Nisi Prius; and he admitted that he could not do so. The question is, has such a distinction ever been drawn? The case of *Newton v. Constable* (a) may be differently construed; but I conceive that, upon the whole, Lord Denman, in his judgment, recognises the rule, admitted to apply at Nisi Prius, also to exist at Westminster Hall; and he expresses no doubt, in referring to the traditions upon this subject, as regarding barristers practising at the Bar. We are undoubtedly without any express decision upon the subject in this country; but we have a *dictum*, as regards this question, in *Duboise v. Wyse* (b). That case was fully argued before the Chief Baron and Pennefather and Greene, BB.; and, in delivering the judgment of the Court, the Chief Baron went very fully into the question of the privilege of barristers, as to discharge from arrest. He says (p. 160):—"Whether this privilege of barristers exist only where there is some actual engagement, as would seem to be suggested to Lord Denman, in the case in 2 Q. B., or applies, whether there be actual engagement or not, as appears to be considered in all the other authorities, it is treated in all as a presumptive privilege. But that presumption must be founded on some reason connected with the administration of justice; and it seems to have resulted from the long established usage, which has required that none but members of the Bar should represent parties in the conduct, in Court, of causes pending in the Superior Courts, or at the Assizes." Therefore, although there may be some doubt as to the case before Lord Denman, as the Chief Baron remarks that there is upon this subject,

H. T. 1860.
Common Pleas.
 RUBENSTEIN
 v.
 —

(a) 2 Q. B. 166.

(b) 1 Ir. Jur., N. S., 157.

H. T. 1860. I do not conceive that the Chief Baron entertained any doubt as to
Common Pleas.
the existence of this principle, in the case of barristers practising
not only at Nisi Prius, but also at Bar. For these reasons, I am of
opinion that this application should be granted.

RUBENSTEIN
v.
—

CHRISTIAN, J.

I participate in the doubt expressed by my Brother BALL. If the only ground on which this gentleman can rest his claim to be discharged be, as I think it is, the existence of a privilege in the Bar as a body to be exempt from arrest for debt, while attending the Superior Courts in search of business, without regard to whether that quest has been successful or not—to whether there is any cause pending in any Court, the progress of which will be impeded, obstructed, or in the slightest degree interfered with, by the detention in custody of the individual who claims the privilege, I must say that I think it doubtful whether such a privilege exists, and still more doubtful whether it ought to exist. This doubt, however, has not, in the short time allowed us for consideration, assumed the form of an opinion sufficiently definite to warrant me in either dissenting from the decisions at Assize Courts, to which we were referred, or holding that there is, between those Courts and the Superior Courts at Westminster or at Dublin, a distinction as regards the matter which the Counsel who opposed the motion admitted that he could not contend for, and the non-existence of which appears to be assumed by the Chief Baron, in the passage read by my Brother KEOGH. Therefore, although not quite satisfied upon the subject, I do not decline to be a party to the order of the Court.

Rule accordingly.

E. T. 1859.
T. T. 1859.
Queen's Bench.

JAMES F. QUIN v. YELVERTON O'KEEFFE.*

(*Queen's Bench*).

April 30.
May 11.
June 11.
July 9.

MOTION to show cause against a charging order, dated the 17th of December 1858, made by Ball, J., in Consolidated Chamber, under the 135th section of the Common Law Procedure Act 1853, whereby it was ordered that, whatever interest the said Yelverton O'Keeffe might have in the sum of £254. 17s. 7d., being part of the sum of £960. 9s. 3d., standing to the credit of the Suitors' Fee-fund account, should stand attached to answer, in part payment, the plaintiff's debt. It appeared from the affidavits in the case that, on the 18th of January 1848, the said Yelverton O'Keeffe executed his bond to W. Owen, for the sum of £232. 6s. 10d., and also accepted a bill of exchange drawn on him by said William Owen, dated the 27th of July 1848, for the sum of £81. 1s. 0d. An arrangement was subsequently entered into between the said Yelverton O'Keeffe and the plaintiff,

The defendant executed a bond, with warrant of attorney to confess judgment, in the penal sum of £620, the only condition of the bond being for the payment of £310, and interest.—

Contemporaneously with the execution of the bond, the plaintiff wrote a letter to the defendant, by which he undertook that, upon the defendant effecting a policy of assurance

on his life, in favour of the plaintiff, for the sum of £310, and paying interest thereon, upon the days therein specified, that he would not put the bond, or a judgment thereon, in force.—*Held*, that in order to entitle the plaintiff to issue execution, it was not necessary, either formerly under the 9 W. 3, c. 10 (*Ir.*) or now, under section 145 of the Common Law Procedure Act 1853, which is substituted for that statute, to assign breaches; the object of the bond, in reserving the payment of the penal sum, not being to secure the performance of some duty or agreement, but to secure the payment of a sum certain, which was a *bona fide* subsisting debt.

The Suitors' Fee-fund is "money," within the meaning of section 135 of the Common Law Procedure Act 1853 (*per* LEFROY, C. J. and O'BRIEN, J.), and as such is chargeable by an attachment order made under that section (HAYES, J., *dubitante*). The word "money," which occurs in the first and third clauses, but is omitted from the second clause of section 135, must be imported, by implication, into such second clause, in order to effectuate the clear intention of the Legislature to deal with "money" in that section, and, by so importing it, to prevent section 135 being rendered completely nugatory as to "money."

When the intention of the Legislature can be collected from the statute itself, words may be modified, altered or supplied in the statute, so as to obviate any repugnancy to, or inconsistency with, such intention.

* *Coram* LEFROY, C. J., PERRIN and HAYES, JJ.

NOTE.—The publication of this case has been unavoidably postponed.

VOL. 10.

50 L

E. T. 1859.

Queen's Bench.

QUIN

v.

O'KEEFFE.

who was the son-in-law of W. Owen, whereby, in consideration of the plaintiff delivering up the bond and the bill of exchange, on the 20th day of January 1851, a bond, with a warrant of attorney to confess judgment for the sum of £310, was executed to the plaintiff by the said Yelverton O'Keeffe; the only condition in said bond being the usual one for the payment of the sum due for principal and interest on foot thereof, on a day therein named. On the same day that the bond was given, judgment was duly entered upon the bond and warrant, as of Hilary Term 1851, and the plaintiff wrote the following letter to the said Yelverton O'Keeffe.

"SIR.—I hereby, at your request, undertake that, upon the terms
"of your effecting a policy of insurance upon your life in my favour
"(my executors, administrators and assigns), in an Insurance office
"to be named by me, and paying the expenses of effecting the same,
"on or before the 20th day of February next, said policy to be
"in the sum of £310, being the principal sum for which you have
"executed your bond to me, and upon the further terms of your
"paying me interest, at £4 per cent., from the date hereof, by
"quarterly payments, on said sum of £310, the first payment thereof
"to be made on the 20th of April next, and every 20th of July,
"20th of October, 20th of January and 20th of April following,
"that then and in such case, I will not put said bond or a judgment
"thereon in force; otherwise this undertaking to be void, and
"of no effect. You are to hand me, as part of this arrangement,
"from time to time, as same shall be paid, or within ten days after,
"the receipts for the premiums on such policy." By an order of the
Lord Chancellor, dated the 28th of October 1858, a retiring pension
of £1000 a-year was allotted to the said Yelverton O'Keeffe, and
the Accountant-General of the Court of Chancery was thereby
ordered, out of the moneys which should be in the Bank of Ireland
standing to the credit of the Suitors' Fee-fund, to draw on the
Governor and Company of the Bank, in favour of the said Yelver-
ton O'Keeffe or his attorney, for the sum of £254. 17s. 7d., and that
he should, quarterly, during the natural life of the said Yelverton
O'Keeffe, draw, in favour of the said Yelverton O'Keeffe, or his
attorney thereto lawfully authorised, for the sum of £250 sterling.

On the 1st of December 1858, a conditional order was granted by the Master of the Rolls, under the 3 & 4 *Vic.*, c. 105, section 23, charging the said sum of £254. 17s. 7d. with payment of the sum of £319. 5s. 11d., stated to be due on foot of the judgment of the said James F. Quin, therein mentioned.

E. T. 1859.
Queen's Bench.
 QUIN
 v.
 O'KEEFFE.

A motion to show cause against this order came on upon the 14th of December 1858; and, on the 12th of January 1859, the cause shown was allowed, and said order discharged, upon the ground intimated by the Master of the Rolls, that the Suitors' Fee-fund being all cash, and no part thereof consisting of Government stock or other Government funds, that that fund could not be charged under the 3 & 4 *Vic.*, c. 105, s. 23. Upon the intimation of this opinion by the Master of the Rolls, the plaintiff, fearing that if the conditional order granted by the Master of the Rolls were discharged, the said Yelverton O'Keeffe would draw his pension before the plaintiff could take any other steps to charge said pension, on the 7th day of December 1858, he obtained a conditional order, in the Court of Queen's Bench, to revive the judgment by suggestion, pursuant to the provisions of the 149th and 150th sections of the Common Law Procedure Act 1853; and this order having been made absolute, the plaintiff, on the 17th day of December 1858, issued a *fi. fa.* on said judgment, and, on said 17th of December 1858, applied to Judge Ball in Chamber, and obtained the said charging order, under the 135th section of the Common Law Procedure Act 1853.

Exham now showed cause.

The first objection is, that the judgment in this case is inoperative; and that there having been no suggestion of breaches by the plaintiff, he was not in a position to issue execution, and same was improperly issued: and if the Court be of this opinion, then the whole matter falls to the ground, and the more important questions, whether the Suitors' Fee-fund can be charged under section 135 of the Common Law Procedure Act 1853, need not be discussed. Notice has been therefore served to set aside the conditional and absolute order to revive; and the suggestion entered

E. T. 1859.
Queen's Bench.

QUIN
 v.
 O'KEEFE.

on the record, in pursuance thereof, and also the execution issued in pursuance of said orders, upon the grounds that the conditional order to revive was obtained without apprising the learned Judge of the existence of the letter of the 20th of January 1851, given collateral with the bond; and that execution on the judgment could not have been legally issued without assigning a breach of the condition or agreement contained in the letter. The letter of the 20th of January 1851, and the passing of the bond by the defendant, must be considered as part of one and the same transaction. The bond is the common money bond, and the letter is collateral with it. There may be a question whether the letter, in order to control the operation of the bond, should not be under seal, as was the case in *Hurst v. Jennings* (a); but *Power v. Lowe* (b) shows that it is not necessary it should be under seal.—[LEFROY, C. J. The words of section 145 of the Common Law Procedure Act are sufficiently large to include a document not under seal; they are, "In any action upon any bond, covenant or agreement for payment of any penal sum, for non-performance of any covenant or agreement contained in any deed or writing."—In *Delacour v. Murphy* (c), the statute 9 W. 3, c. 10, s. 8, was held to be imperative; that breaches must be assigned, and that the statute could not be evaded by private agreement.—[LEFROY, C. J. I remember that case coming before us in the Exchequer. At first I was inclined to think that the party might bind himself not to insist upon the statute, upon the maxim *quisque potest renunciare juri pro se introducto*; but the answer which occurred to my mind to that was, that as the Act was passed, not *pro privato commodo*, but *pro bono publico*, its provisions could not be evaded, *pro privato commodo*.]—There is no case where, when there is an agreement collateral with the bond, the plaintiff can issue execution without suggesting breaches. There is no affidavit, on the part of the plaintiff, disclosing the facts to the Court, or showing that the condition of this bond has been broken: *Harrington v. Coxe* (d).

(a) 5 B. & Cr. 650.

(b) 5 Ir. Com. Law Rep. 364.

(c) 13 Ir. Law Rep. 195.

(d) 3 Ir. Com. Law Rep. 87.

Gamble, contra.

Sections 149 and 150 of the Common Law Procedure Act 1853, and the form of suggestion given in schedule B, No. 10, show that the suggestion to revive a judgment, given by that Act, is intended to operate as an award of execution, and it is limited to very plain cases, in which it "manifestly appears to the Court that the party is entitled to execution." When it is necessary to assign breaches, the proceeding should be by writ of revivor; and, by the 107th General Order of January 1854, the plaintiff or his representative may suggest breaches: *Mackey v. Aleock* (a). Before the Statute of Westminster 2nd, c. 45, it was necessary to bring an action on the bond, when it was more than a year old, but, by that statute, the writ of *sci. fa.* was substituted. Where, however, execution was suspended, by agreement between the parties, it was not necessary to revive by *sci. fa.*, for the purpose of issuing execution: *Hiscocks v. Kemp* (b). The cases cited on the other side, in which it was held necessary to suggest breaches, do not apply to a case like the present.—[LEFRON, C. J. Those cases were decided, *not upon the special words in the instruments*, but upon the principle that the bond was for the payment of a penal sum, to secure the performance of a collateral agreement; and when that occurs, then the Act of Parliament interferes, and requires breaches to be suggested, in order to obviate the necessity of the parties going into Equity, to obtain an issue *quantum damnificatus*. The provisions of the Act of Parliament are a substitution for the equitable remedy which the party previously had.]—Admitting the principle of the Act, it does not apply here, as the bond was not passed to secure the performance of an agreement. But first, as to the other point raised, the defendant cannot now complain of the suppression of facts, as he had the fullest opportunity of relying upon the letter of the 20th of January 1851, when the case was before the Master of the Rolls; and, having neglected to do so, the plaintiff was not called upon to mention those circumstances to the Court, when seeking the order to revive. He could also have come to the Court when the conditional order for the suggestion was served.—

E. T. 1859.
Queen's Bench
QUIN
v.
O'KEEFE.

(a) 6 Ir. Jur. 111.

(b) 3 Ad. & El. 676.

E. T. 1859.
Queen's Bench

QUIN
 v.
 O'KEEFE.

[HAYES, J. That is certainly a strong circumstance against the defendant.]—Next, this case does not fall within section 145 of the Common Law Procedure Act 1853, by which breaches are required to be assigned, as all the cases which have been held to come within this statute, or the old statute, 9 W. 3, c. 10, may be comprised under one of two classes: first, where the amount of the penalty of the bond was a mere nominal sum, to secure the performance of some duty; or, secondly, where the penalty was to secure the payment of a principal sum by instalments. In the former of these classes it was necessary to assign breaches before issuing execution, because all the plaintiff was entitled to recover was damages for the non-performance of the duty; and the amount of damages should be assessed by a jury, for which execution then issued. In the latter class it was necessary to assign breaches, because the bond was, according to the statute, to stand as a security for future instalments: *Murray v. The Earl of Stair* (a). But in this case the penalty was £620, to secure the payment of £310, which was due as a *bona fide* debt, and not to secure the performance of any agreement. The letter is, at most, only a promise, in a certain event, not to issue execution.

The cases cited on the other side only show that, if there be a letter contemporaneous with the bond, both should be read together. In *Power v. Lowe* (b), the letter showed that the bond was to secure the due performance of the defendant's duty as a receiver. In *Harrington v. Coxe* (c), the bond was to secure the payment of a principle sum by instalments. The letter in the present case is nothing more than a promise of the plaintiff not to issue execution, if the terms of the letter were complied with; if not, then the plaintiff was to be at liberty to issue execution at once for the full amount of his debt. This is like the case of *post obit* bonds, and within the rule laid down in the judgment of Abbott, C. J., in *Murray v. The Earl of Stair*, "That bonds for the payment of a sum certain at a day certain are not within" the statute of *William; James v.*

(a) 2 B. & Cr. 82.

(b) *Supra*.

(c) *Supra*.

Thomas (a); *Van Sandau v. ——— (b)*. There is no case in which it has been held necessary to assign breaches, where upon the happening of an event the entire amount secured by the bond is to become payable; because the jury in such a case would have no damages to assess, and it would be unnecessary to send the case to them to ascertain the mere fact whether the event had happened, as that could at all times have been ascertained by affidavit in a Court of Law; and the necessity of having recourse to a Court of Equity, to obviate which the statute was passed, could never have arisen in such a case: *Smith v. Bond (c)*. Should execution issue against the defendant for a greater amount than is really due, the remedy is under the 4 *Anne*, c. 16, s. 13, whereby the Court can give him relief upon his paying into Court the amount actually due. *Smith v. Bond*, and *Murray v. The Earl of Stair (d)*, show that cases which fall within the statute of *Anne* do not come within the statute of *William*.

E. T. 1859.
Queen's Bench
 QUIN
 v.
 O'KEEFE.

Exham, in reply.

Under the Common Law Procedure Act 1853, unless the plaintiff has actually issued execution, a charging order should not be granted, or if granted is of no effect. Under the 3 & 4 *Vic.*, c. 105, it was not necessary for the plaintiff to be in a position to issue execution before seeking the charging order; and, therefore, the defendant could not have then raised the question of the necessity of assigning breaches. It is when he seeks to realise the fruits of his judgment, by issuing execution, that he must suggest breaches. The word "money," which occurs in section 135 of the Common Law Procedure Act, is not in the 3 & 4 *Vic.*, c. 105, s. 23. In *Smith v. Bond*, the Court considered that the bond had become a bond for the payment of a sum certain, and fell within the statute of *Anne*; and therefore, according to *Murray v. The Earl of Stair*, was not within the statute of *William*.—[LEFROY, C. J. Does the Common Law Procedure Act speak of any case except the case of a bond for payment of a penal sum for the non-performance of a covenant or

(a) 5 B. & Ad. 40.

(b) 1 B. & Al. 214.

(c) 10 Bing. 125.

(d) *Supra*.

E. T. 1859. *Queen's Bench*
 QUIN
 v.
 O'KEEFE. agreement contained in any deed or writing? Is this a bond of that description? Is it not a bond for securing the payment of a sum of money, which is a good subsisting debt, and not for the performance of a covenant or agreement? According to the authorities, therefore, it does not fall within the statute of *William*, or the 145th section of the Common Law Procedure Act 1853, which is now substituted for it; and there is no necessity to assign breaches.—*HAYES, J.* The penal sum is here stated to be £620, whilst there is only £310 admittedly due.—*LEFROY, C. J.* Where the object of the bond, in reserving the payment of a penal sum, is to secure the performance of some duty or agreement, in that case the statute applies, and breaches must be assigned; but it does not apply where, as in the present case, it is to secure the payment of a sum certain, which is a good, valid *bona fide* debt].

May 11. This case having come on for argument this day,* upon the second question involved in it, namely, whether, upon the true construction of section 135 of the Common Law Procedure Act 1853, the Suitors' Fee-fund was the subject of a charging order under that section, and it having been suggested in course of the argument, by the defendant's Counsel, that the word "money," which occurs in section 135, was introduced into the section by a mis-print, the Court ordered the case to stand over until the Parliament Roll was examined, and it was ascertained whether the word "money" occurred in the section, as it stands in the Parliament Roll.

T. T. 1859.
June 11. The officer of the Court having in the meantime communicated with the Clerk of the House of Commons, and ascertained that the 135th section of the Common Law Procedure Act 1853 is accurately printed from the Parliament Roll, and that the word "money" is in the section as inscribed in the Roll, the argument of the case was resumed.

J. E. Walsh (with him *R. W. Gamble*), in support of the charging order.

The Suitors' Fee-fund is created by the 6 & 7 W. 4, c. 72, ss. 3,

* *Coram Full Court.*

10, 15, 20, and consists of cash standing in the name of the Accountant-General of the Court of Chancery. Sections 36 and 38 of the Chancery Regulation Act 1850 (13 & 14 *Vic.*, c. 89) enabled the Lord Chancellor to make his order of the 28th of October 1858, declaring the defendant entitled to his retiring allowance, payable out of the Suitors' Fee-fund. When the Lord Chancellor makes his order, the defendant's title is complete, and he may draw the allowance himself, or authorise any person, by power of attorney, to do so. When application was made to the Master of the Rolls, for a charging order, under the 3 & 4 *Vic.*, c. 105, s. 23, he declined to make the order, upon the ground that the word "money" is not mentioned in that section: 11 *Ir. Jur.*, p. 167. The plaintiff then applied to this Court for a charging order, under section 135 of the Common Law Procedure Act 1853, in which "money" is expressly mentioned, to attach the fund as cash. It is argued on the other side, that this is not such an ascertained fixed fund as can be the subject of a charging order; and also, that such an order cannot be made under section 135 of the Common Law Procedure Act 1853, because the word "money" is omitted in the enacting part of that section. As to this latter point, the case of *In re Wainwright* (a) shows conclusively that the word "money" may be supplied by necessary implication. In *Browne v. Ellis* (b), funds standing in the name of the Accountant-General of the Incumbered Estates Court were charged under the 135th section.—[O'BRIEN, J. By section 132, money standing in the name of a trustee would not be liable to be charged, but only stocks, funds, annuities, &c. To carry out your construction, you will therefore have to supply much more than the word "money" in the 135th section; nor will the introduction of that word alone answer your purpose, for the clause will then stand thus:—"It shall be lawful for the Court or a Judge to make such order as to such stock, funds, annuities, shares and money, and the dividends, interest and annual produce thereof, as if *the same* had been standing in the name of a trustee for such judgment debtor." This refers back to section 132, by which the Court can charge

T. T. 1859.
Queen's Bench.

QUIN
v.
O'KEEFE.

(a) 1 Ph. 258.
VOL. 10.

(b) 3 *Ir. Com. Law Rep.* 106.
51 L

T. T. 1859.
Queen's Bench.

QUIN
v.
O'KEEFE.

Government stock, funds, &c., standing in the name of a trustee, but not money standing in the name of a trustee. If, therefore, the Court can, under section 135, only make an order, as it can under section 132, that is an order as to stock, funds, &c., and shares standing in the name of a trustee, and not an order as to "money." It is clear that, as to money standing in the name of the Accountant-General, no order can be made at all; you must, therefore, in addition to the word "money," add "as if stocks, funds or shares" had been standing in the name of a trustee, &c.]—The word "same" in section 135 must be read distributively thus, "as if the same," that is, such stock, such funds, &c., had been standing in the name of a trustee, &c.—[O'BRIEN, J. That shows that the introduction of the word "money" into that section is not sufficient for your purpose.—LEFROY, C. J. Can money in the hands of a trustee be charged under the garnishee clauses?—It can. The object of the Common Law Procedure Act 1853 is to increase the creditor's remedy, against every available species of his debtor's property. Although the exact amount to which a party may be entitled, of the stock standing to the credit of a cause, be not ascertained, yet as soon as it is ascertained that he is entitled to a portion of such amount, it may be charged under the 3 & 4 *Vic.*, c. 105, ss. 23, 24: *White v. O'Grady* (a); *White v. Heron* (b). There are conflicting decisions as to whether shares of the next-of-kin in an administration fund can be charged under section 135 of the Common Law Procedure Act 1853. In *Warren v. Wyse* (c), the Court of Exchequer made the charging order; in *Hatchell v. Wyse* (d), the Court of Common Pleas refused to do so. In *Brownrigg v. Colclough* (e), such an interest was charged under the 3 & 4 *Vic.*, c. 105, s. 23.—[LEFROY, C. J. What words can be wider than those of section 135 of the Common Law Procedure Act 1853, "an estate or interest in any stock, funds, annuities or shares or money?"—No injustice can be done by this Court making the charging order, as the plaintiff must go to the Rolls to carry it out.

(a) 2 Ir. Chan. Rep. 333.

(b) 5 Ir. Law Rep. 167.

(c) 4 Ir. Com. Law Rep. 235.

(d) 4 Ir. Com. Law Rep. 286.

(e) 7 Ir. Chan. Rep. 524.

Sullivan (with him *Exham*), contra.

Money cannot be charged either under the 3 & 4 Vic., c. 105, or the Common Law Procedure Act 1853; but, even if it could, then the Snitors' Fee-fund is not such money as can be charged under the 135th section. The Court cannot introduce the word "money," which is omitted from the enacting part of section 135, into it. When a statute creates a new power, its terms must be strong, cogent and free from ambiguity, in order to warrant the Court extending its provisions. The rules by which statutes should be construed are well enunciated in the judgments of the Court in *Millar v. Salomons* (a). The word "money" being omitted in the enacting part of section 135, whilst it is found in the clause preceding and following, shows a deliberate intention on the part of the Legislature not to legislate with respect to money, and that it must have crept into the section by mistake.—[PERRIN, J. I should rather say that it was omitted from the enacting part of the section by mistake.]—The Act of Parliament purports to put the Accountant-General in the same position as a trustee; and, as money standing in the name of a trustee for the judgment debtor cannot be charged, neither can *money* standing in the name of the Accountant-General. The only charging order which the Court can make under section 135 is such as could be made under section 132, in which there is no mention made of money. The Court is called upon to read the word "money" before the words "stock, funds," &c., in section 135; but, if it do so, then the word "same" will have a meaning not contemplated by the Act, which clearly intended to confine to the matters made chargeable under section 132, in which money is not spoken of.

T. T. 1859.

Queen's Bench

QUIN

v.

O'KEEFE.

This day having been fixed specially for the further hearing of this case*— July 9.

Sullivan resumed his argument.

Before the creditor can have his charging order, he must have

(a) 7 Exch. 550; 8 C., 17 Jur. 463.

* *CORAM LEFROY, C. J., O'BRIEN and HAYES, JJ.*

T. T. 1859. *Queen's Bench.* issued execution. Section 135 draws a distinction between the transfer of stock, funds, &c., and the payment of the dividends, interest, &c., thereof. The Court of Chancery, as such, has no jurisdiction over the Suitors' Fee-fund. It is the Lord Chancellor, who, with the consent of the Commissioners of the Treasury, has power to fix the amount of the retiring allowance. When it is provided by section 135 that no such order shall prevent the Governor and Company of the Bank of Ireland from permitting any transfer for such stock, funds, &c., the fund contemplated there is a fund over which the Court of Chancery, &c., has power; a fund brought into Court, the right to which, as between the several claimants, is to be decided upon by the Court; but not a fund created by Act of Parliament, and over which the Lord Chancellor has no power, except to fix the amount of the retiring allowance to be paid out of it. The Suitors' Fee-fund is a fluctuating fund; and, according to *Wytham v. Lynch (a)*, it is not chargeable. The charging order is in the nature of a statutable execution; the Accountant-General is not to sell, but to hand over the very thing charged, to the Sheriff. If, in this case, the Court made such an order, how can it be carried out, the Accountant-General of the Court of Chancery not being amenable to the orders of this Court? A pension granted by the East India Company was held not to be chargeable under the 1 & 2 *Vic.*, c. 110, ss. 14 and 15: *Morris v. Manesty (b)*.

Gamble, in reply.

To bring a judgment debtor within section 135 of the Common Law Procedure Act, only two things need be shown; first, that there is a fund standing in the name of the Accountant-General, within the meaning of the Act; and, secondly, that the judgment debtor has an interest in that fund. The fund here sought to be charged is the Suitors' Fee-fund, which is created by the 6 & 7 *W.* 4, c. 74, ss. 3, 10, 15 and 20, and out of which the retiring allowance of the defendant is payable. By the 13 & 14 *Vic.*, c. 89, s. 37, the officers there mentioned are to pay the fees received by

(a) *Supra*.

(b) 7 Q. B. 674.

them into the Bank of Ireland, to the credit of the Accountant-General, to an account called "the Suitors' Fee-fund account;" and, by the 19 & 20 *Vic.*, c. 92, s. 28, any deficiency in the said "Suitors' Fee-fund account" is, from time to time, to be made up by advances from the Consolidated Fund. It is objected, that this fund being all "cash," and not "stock," that it is not chargeable under section 135 of the Common Law Procedure Act, that section not having provided for making a charging order upon "cash." Although this point has been now started, for the first time since the passing of the Act, yet Judges of all the Courts of Common Law have made orders charging cash, none of which, up to the present, have been questioned: *Browne v. Ellis* (a). As to the construction of section 135; there is no rule of construction more stringent than this, that the intention of the Legislature, as appearing from the Act itself, must, if possible, be carried out by the Court: *Dormer v. Packhurst* (b). The first part of section 135, which makes mention of "stock, funds, annuities or shares or money," is a legislative declaration of an intention to legislate upon those several matters; and the same intention is apparent in the conclusion of the section, where provision is made for the transfer of "stock, funds, annuities, and shares or money." There being, therefore, a clear intention to legislate with respect to money, the Court is bound to carry out that intention, although the word "money" is omitted from the enacting portion of the section, by which the Court or a Judge is empowered to make a charging order only against "such stock, funds, annuities and shares, and the dividends, interest and annual produce thereof." This intention may be carried out, either by giving to the word "funds" a general meaning, so as to include "money," or, by inserting the word "money," by implication, into that part of the section from which it is omitted. The word "funds" has a general meaning, and may include either "stock" or "money," and has been used in the 21st section of the 6 & 7 *W.* 4, c. 74, the Act creating the Suitors' Fee-fund, to designate both the "stock" and "money" in that fund. When Acts of Parliament are *in pari materia*, if the same word occur in both statutes, the meaning

T. T. 1859.
Queen's Bench.

QUIN
v.
O'KEEFE.

(a) *Supra.*

(b) 3 *Ask.* 135, 136.

T. T. 1859. *Queen's Bench*,
 QUIN
 p.
 O'KEEFE, which is plainly given to it in one Act is a legislative exposition of the sense in which it may be understood in the other. In a remedial statute, such as this, the more extended meaning may be given to the word. Words, too, may be construed in a sense other than the ordinary one, when such a construction will aid the remedy: *Lyde v. Barnard* (a); *Dwar. on Stat.*, p. 557. But, secondly, the word "money" may be inserted by implication in the enacting part of the 135th section. It is a well settled rule of construction that one part of a statute must be so construed by another part of it, that the whole may, if possible, stand: *Dwar. on Stat.*, p. 568. Here the word "money" is, in the beginning of section 135, as one of the matters intended to be charged; it occurs also at the end of the section, as if it had been made liable to the charging order by the prior part of the section; so that unless the word "money" be inserted by implication into the middle or enacting part of the section, it will have no meaning in the beginning or at the end of the section, which would be in direct contravention of the rule, that effect, if possible, should be given to every word in an Act of Parliament, and that its parts should all agree and stand together: *Poulter's case* (b); *Dwar. on Stat.*, p. 577. If the Court do not insert the word "money" by implication into the enacting part of the section, then it must strike out that word from the two other parts of the section where it occurs, which is against all rules of construction: *Woodward v. Watts* (c). As to the cases of *Gilman v. Crowley* (d) and *Millar v. Salomons* (e), the distinction is this, that the intention of the Legislature alluded to by the Court in these cases was a supposed intention, gathered from something outside the Act, and not, as here, an intention apparent from the very words of the Act itself. But the present case is concluded by the authority of the case of *In re Wainwright* (f). In that case, as here, there were three events enumerated in the prior part of the section, upon the occurrence of any of which the Court of

(a) 1 M. & W. 101, 113.

(b) 11 Co. 29, 34.

(c) 2 EL. & BL. 452; S. C., 17 Jur. 790; 22 L. J., M. C., 149.

(d) 7 Ir. Com. Law Rep. 587.

(e) *Supra*.

(f) 1 Ph. 258.

Chancery was to be protector of the settlement; but only two were dealt with in the enacting part. Lord Lyndhurst says (p. 261):—

“Those words (those occurring in the prior part of the section) cannot be struck out of the Act; and it is much more natural to supply the words (omitted from the enacting part) than to adopt a construction which would deprive the preceding words of all meaning.” As to the objection that the word “same” will not be sufficient, without adding other words as well as the word “money,” several words may be added, to aid the construction and give effect to the statute: *Dwar. on Stat.*, p. 538; *King v. Everdon* (a). The Court, then, having power to charge money in the hands of the Accountant-General, under section 135, the Suitors’ Fee-fund is clearly chargeable thereunder. As to the Suitors’ Fee-fund being a fluctuating one, and, as such, not the kind of fund contemplated by section 135, that objection would lie equally to every fund in the name of the Accountant-General, whether to the credit of a cause, or in lunacy or otherwise, as it may be increased by further sums being paid into Court, or diminished by sums paid out under orders of the Court. But however fluctuating the Suitors’ Fee-fund may be, once an instalment of the defendant’s retiring allowance becomes due under the Lord Chancellor’s order, the sum then in the Suitors’ Fee-fund is applicable to pay such instalment; and the defendant, under the Lord Chancellor’s order, acquires such an interest as may be charged under section 135. The case of *Wytham v. Lynch* (b) does not apply at all to the present case, because the Suitors’ Fee-fund in England is entirely different from the Suitors’ Fee-fund in Ireland, both in its constitution and the statutes by which it is created; these are the 32 G. 3, c. 42, and the 46 G. 3, c. 128. It is submitted, therefore, that the Suitors’ Fee-fund is a fund standing in the name of the Accountant-General, within the meaning of section 135 of the Common Law Procedure Act 1853; that the defendant has, by virtue of the Lord Chancellor’s order granting him a retiring allowance, such an interest in that fund as can be charged under this section; and that, consequently, the order

T. T. 1859.
Queen's Bench.

QUIN
v.
O'KELLY.

(a) 9 Exch. 101.

(b) 1 Exch. 291.

T. T. 1859. of the 17th of December 1858, made by Ball, J., should stand, and
Queen's Bench. this motion, on the part of the defendant, be dismissed with costs.
 QUIN *Cur. ad. vult.*
 v.
 O'KEEFFE.

LEPROY, C. J.

July 9.

In this case we are of opinion, although some doubt is entertained by one of the Members of the Court, that the cause shown against making absolute the conditional order obtained in this case should be disallowed. Two questions have been raised; first, whether the fund which is sought to be affected by this charging order falls within that class of property as to which a charging order may be made under section 135 of the Common Law Procedure Act 1853? and, secondly, assuming that it is so, whether such an order can be made under that section as it stands, or whether it is not necessary, for that purpose, to import into that part of the section which empowers the Court or a Judge to make the charging order the word "money?" which, although used at the beginning and end of the section, has been omitted from that part of it by which the Court or a Judge is empowered to make the order. Now, with respect to the first question, the fund sought to be charged, the Suitors' Fee-fund in Ireland is a very different thing from the Suitors' Fee-fund in England; because in Ireland the Consolidated Fund is constituted a security for making good all the deficiencies in the Irish Suitors' Fee-fund, which may arise from time to time in consequence of its not being sufficient to defray the several charges upon it: and although, therefore, it may be said that a charging order could not be granted upon any part of the Suitors' Fee-fund in England, where the charges upon it are in the nature of annuities, because *non constat* such a fund may exist, and, therefore, there may not be any subject-matter upon which a charging order could attach, yet that reasoning has no applicability to the Suitors' Fee-fund constituted as it is in Ireland. The only difficulty, therefore, which we have to encounter is, whether this Suitors' Fee-fund in Ireland falls within the terms of section 135, "any stock, funds, annuities, shares or *money* which shall be standing in the name of the Accountant-General of the Court of Chancery, &c." The main difficulty in this case arises as to the word

“money,” which, in the outset of section 135, the Legislature have declared that they had in their contemplation, and with respect to which they have avowed a clear intention to legislate. Section 135 commences thus:—“If such debtor shall have an estate or interest in any stocks, funds, annuities, shares or *money*, which shall be standing in the name of the Accountant-General of the Court of Chancery, or of the Court of Commissioners for the Sale of Incumbered Estates in Ireland, or of the Master of any such Superior Court of Common Law, or in the dividends, interest or annual produce thereof, it shall be lawful for the Court or a Judge to make such order as to such stock, funds, annuities, shares, and the dividends, interest and annual produce thereof, as if the same had been standing in the name of a trustee, &c.; but no such order shall prevent the said Governor and Company of the Bank of Ireland from permitting any transfer of such stock, funds, annuities and shares, or *money*, or the payment of the dividends, interest and annual produce thereof, in such manner as the said Court of Chancery, or the Commissioners for the Sale of Incumbered Estates in Ireland, or the Court of Common Law, may direct.” Now in order to understand this section, it is necessary that we should go back to section 131, and consider that section, as also sections 132, 133 and 134; and when we have done so we shall have got, in my opinion at least, a clear guide to the construction of section 135. These several sections constitute a series of enactments, providing for a defect in the Common Law, and giving to creditors a more ample remedy against the property of their debtors than existed at the Common Law. The first of these is section 131, under which *money*, that is, tangible, visible money, and securities for money, may be seized and taken under a writ of *fi. fa.*, and which could not have been seized at Common Law under an execution. The next enactment (section 132) extends the remedy as against what may be termed the representatives of money, “Government stock, funds or annuities, or any stock or shares in any public company in Ireland, whether incorporated or not, and standing” in the name of the person against whom the judgment has been recovered, “and in his own right, or

T. T. 1859.
Queen's Bench.
 QUIN
 v.
 O'KEEFFE.

T. T. 1859.
Queen's Bench.

QUIN
 v.
 O'KEEFE.

in the name of any person in trust for him." The next enactment (section 134) gives a remedy as against the same species of property, but which is "not vested or in possession, but contingent, or in remainder or reversion," and which, as in section 132, is standing in the name of the debtor, "and in his own right," or in the name of any "person in trust for him;" the terms of section 134 being, "any such stock, funds, annuities or shares," &c., thereby clearly referring to section 132, and dealing with the same kind of property, although the interest of the debtor therein may not be precisely of the same nature. Then we come to section 135, which still progresses, and gives a clear and sufficient remedy, not only as against any interest of the debtor in "any stock, funds, annuities or shares," but also as against "money which shall be "standing in the name of the Accountant-General of the Court of "Chancery, or of the Commissioners for the Sale of Incumbered "Estates in Ireland, or of the Master of any such Superior Court "of Common Law." Here there is a regular series of progressive legislation, by which, first, money or securities for money, in the hands, or in the box, or chest, in fact the visible, tangible property of the debtor, may be taken under an execution. These various representatives of money, consisting of "Government stock, funds "or annuities, or any stock or shares in any public company in "Ireland," standing in the debtor's own name, or in that of a trustee for him, and in which the debtor has an immediate or a reversionary interest, may be attached; and then, finally, by section 135, "stocks, funds, annuities or shares," in which the debtor has an estate or interest, standing, not in his own name, or in the name of a trustee for him, but in the name of the Accountant-General of the Court of Chancery, &c., may be attached; still advancing the remedies of the creditor. Then there comes an item, for the first time provided for by this 135th section, and of which no notice has been taken in any of the previous sections, I mean *money*, not standing in the debtor's own name, or in the name of a trustee for him, or in the books of any public company, or in the Bank, but money standing in the name of the Accountant-General of the Court of Chancery, or of the Court of the Commissioners for the Sale of

Incumbered Estates in Ireland, or of the Master of the Superior Courts of Common Law, and which is thus appropriated, set apart and ear-marked, and made available for the benefit of creditors. The Legislature, therefore, having intended to increase the remedy, by enabling the creditor to charge stocks, funds, annuities and shares standing in the name of the Accountant-General, &c., I cannot see any reason why it should not equally intend to include money, when it is thus ear-marked, as much as stocks, funds, &c., standing in the name of the Accountant-General, &c., which are admittedly chargeable. If the Legislature intended that money, when thus ear-marked, should not be the subject of legislation, why did they use the word "money" at all? Why introduce it into this section of the Act? I cannot suppose that they did so for any other reason than for the purpose of legislating for it, as they had done with respect to the other classes of property made chargeable by that section. I admit that in section 135, where it is said, that "it shall be lawful for the Court or Judge to make such order," the word "money" is dropped, and that the order is only to be made, "as to such stocks, funds, annuities, shares, and the dividends, interest and annual produce thereof;" but, in a subsequent part of the section, which provides that no such order shall prevent the transfer of such stocks, funds, annuities and shares, *or money*, and the payment of the dividends, interest or annual produce thereof, in such manner as the Court of Chancery, or the Commissioners for the Sale of Incumbered Estates, or the Court of Law, may direct, the word "money" is introduced, thus clearly bringing it within the operation of the proviso; and if the proviso is to have any effect at all in respect of it, it must be upon the supposition that it was contemplated as being otherwise included in the body of the section; for it is the office of a proviso to take out of the body of the section what otherwise would be within it, which is in accordance with the definition of *Plowden* (a). In support of this construction we have the express authority of a very able and eminent Judge, Lord Lyndhurst, in *In re Wainwright* (b), in which certain words having been used in the previous part of

T. T. 1859.
Queen's Bench.
 QUIN
 v.
 O'KEEFE.

(a) p. 361.

(b) 1 Ph. 258.

T. T. 1859. *Queen's Bench.* the section of an Act of Parliament, the omission of them in another part of the section was supplied by implication, upon the ground that otherwise no effect could be given to the words in the previous part of the section; and that as those words could not be struck out of the Act, it was much more natural to supply them in the subsequent part, than to adopt a construction which would deprive the words in the previous part of the section of all meaning. Now that reasoning is entirely applicable to the present case; so that unless we insert the word "money," by implication, into the enacting part of section 135, that section as to *money* will be completely nugatory. The observations made by Chief Baron Pollock, in *Millar v. Salomons* (a), only apply to cases where it is possible to find a meaning in the words used; we are not then to substitute others, to obtain a meaning of our own. I shall make only this further observation, that as several orders charging money have been made by Judges in all the Courts of Common Law in this country, we should be disposed to follow in the track which they have marked out for us, and rather to follow than disturb, without strong reasons, what has been already done. I am, therefore, of opinion that this conditional order should be made absolute.

QUIN
v.

O'KEEFE.

O'BRIEN, J.

In this case I am also of opinion that defendant's application to set aside the charging order of December last should be refused. I shall first consider the question, as to the construction of the 135th section of the Common Law Procedure Act of 1853, whether, under that section, the estate or interest of a judgment debtor, in "money" standing in the names of the Accountant-General of the Court of Chancery, &c., can be attached to answer his debt in the same manner as the estate or interest in stocks, funds, annuities or shares, so standing in such names, could be attached. In the first clause of that section, the word "*money*" is used, showing the intention of the Legislature to deal with "*money*," so standing, in the same manner as with stocks, funds, &c., so standing. The question, however, arises upon the second clause of the section

(a) 7 Exch. 475; S. C., 16 Jur. 375; 21 L. J., Exch., 161.

which, while it empowers the Court or Judge to make the attaching or charging order, with respect to such stocks, funds, annuities and shares, and the dividends thereof, omits the word "*money*." But, in the third clause, which provides for some of the consequences of such charging order, the word "*money*" is again used, as if it had been actually mentioned and dealt with by the second clause, and included in the power thereby given to make such charging order.

Plaintiff contends that, upon the entire of this 135th section, it should be construed to include in its provisions "*money*," as well as stocks, funds, &c., standing in the name of the Accountant-General, &c. But for this purpose (as I have already stated during the argument) it will not be sufficient merely to introduce the word "*money*," in the second clause, after the words, "stocks, funds, annuities and shares." The effect of doing so would be only to give the Court the same power with respect to "*money*" standing in the name of the Accountant-General, as with respect to "*money*" standing in the name of a trustee; but, on referring to the 132nd section, which enables the Court to charge stock, &c., standing in the name of a trustee for the judgment debtor, we find that it does not contain the word "*money*," and does not, therefore, give any power to charge "*money standing in the name of such trustee*." In order to support plaintiff's construction of the 135th section, the second clause should be read as if not merely the word "*money*" had been so inserted after the words "*stocks, funds, annuities and shares*," but also as if, instead of the words "*as if the same had been standing in the name of a trustee for such judgment debtor*," the words of the clause had been, "*as might have been made in respect of stock, funds, annuities and shares, standing in the name of a trustee for such judgment debtor*," or to that effect. I am of opinion that we should give the 135th section the construction contended for by the plaintiff, and that we should read it as if those words, or others to that effect, had been inserted in it, and that we can do so without violating any of the settled rules for the construction of statutes. It appears to me that this case is within the principle of the decision in that of *In re Waine-*

T. T. 1859.
Queen's Bench
QUIN
v.
O'KEEFE.

T. T. 1859.
Queen's Bench.
 QUIN
 v.
 O'KEEFE.

wright (a). One of the questions in that case arose upon the 33rd section of the statute, 3 & 4 W. 4, c. 74, for abolishing fines and recoveries in England; whether, under that section, the Court of Chancery, in the event of the protector of a settlement being convicted of treason or felony, became the protector of that settlement, as well as in the case of the protector being an infant, or of its being uncertain whether the protector was living or dead. The early part of that section mentions the case of a protector "being convicted for treason or felony," as well as the cases of "his being an infant, or of its being uncertain whether he was living or dead," as the cases for which provision was to be made; but the subsequent part of that section, declaring that the Court of Chancery should be the protector, in place of the person who should be an infant, or whose existence could not be ascertained, omits the case of a person convicted of treason or felony. Lord Lyndhurst, however (in accordance, as would appear, with the opinion upon that question of the Vice-Chancellor, before whom the case was originally heard), held that the section should be read as if the words "*in lieu of the person who shall be convicted*" had been inserted in the second part of the section; that the omission of these words should be supplied by implication, *or otherwise no effect could be given to the previous words*, "if any protector of a settlement shall be convicted of treason or felony," and that it was more natural to supply such words in the second part of the section, than to adopt a construction which would deprive those previous words of all meaning, and would, in fact, have the effect of striking them out of the Act. No subsequent case, referring to Lord Lyndhurst's decision, has been cited; but it would appear that his construction of the statute has been adopted by the Profession, as, if any doubt was entertained of its correctness, it is unlikely that such doubt would not have been remedied by legislation.

With respect to the statute now before us, there is the further matter to which I have already referred, that the word "*money*" occurs not merely in the first, but also in the third clause of the 135th section of that statute; and is not this a further

ground for our applying to the construction of that section the principle upon which Lord Lyndhurst acted in *Wainwright's case*, and for our supplying, by implication, the omission from the second clause of words to the effect I have mentioned, instead of our adopting the construction contended for by defendant, which would deprive of all meaning the word "money," as well in the subsequent as in the preceding clause, and virtually strike that word out of both clauses?

The circumstance that the power of charging "money" standing in the name of a trustee is not given by the 132nd section may be relied on as a ground for our holding that it was not the intention of the Legislature to give that power, by the 135th section, in respect of "money" standing in the name of the Accountant-General or of the Incumbered Estates Court; but reasons may be assigned why it should have been considered expedient to give such power, in the latter case, though not in the former; and, independent of this consideration, I do not think that any inference, from that circumstance, of an intention, on the part of the Legislature, to deal in the same manner with the latter as with the former case, should prevail against the more positive expression of a contrary intention, by the use of the word "*money*," in the first and third clauses of the 135th section. The observations of Baron Parke and Chief Baron Pollock, in the case of *Millar v. Salomons* (a), have been relied on by defendant's Counsel. But, on considering the facts of that case, and the arguments in reply to which those observations were made, I think it will be found that our decision in the present case is not at variance with them. Those observations were made with reference to the proposition contended for in that case, that the construction of a statute, according to the plain and ordinary meaning of its words, might be disregarded, on the ground of the injustice or impolicy of the results to which such construction would lead; and, accordingly, the Chief Baron states (b):—"That when the meaning of a statute "is plain, the Court have nothing to do with its policy or impolicy,

T. T. 1859.
Queen's Bench.

QUIN
v.
O'KEEFE.

(a) 1 Exch. Rep. 546, 560.

(b) p. 560.

T. T. 1859. "its justice or injustice;" and "that, if the meaning of the language
Queen's Bench. "used by the Legislature be plain and clear, the Court have nothing
 QUIN
 v.
 O'KEEFE.

These or the other observations in that case do not, however, affect the principle, that when the intention of the Legislature can be collected from the statute itself, these words may be modified, altered or supplied in the statute, so as to obviate any repugnancy to, or inconsistency with, such intentions; and in the case now before us, in giving to the statute in question the construction I have stated, we do so, not merely on the ground that such construction is in accordance with the policy of the Act, and with the object which the Legislature had in view, of extending the rights and remedies of judgment creditors, but because we think that the intentions of the Legislature to give, by the 135th section, a charging power, in respect of money, can be sufficiently collected from the terms of that section itself, and that we are accordingly authorised to supply, in one part of that section those words, the omission of which would be inconsistent with such intention, and with the other clauses of that section.

From the passing of the statute until the present case, it does not appear that any doubt was entertained of the statute having given the power to charge money standing in the name of the Accountant-General; and, in several cases, this Court and the other Courts of Law have acted on the supposition that the statute gave such power. This would not, of course, be a ground for our present decision, as the question was not raised in any of those cases; but it is satisfactory to be able, upon other grounds, to come to a conclusion in accordance with the practice which has hitherto prevailed.

Supposing, however, that the charging power given by the 135th section extends to money standing in the name of the Accountant-General, &c., defendant's Counsel further contend that the estate or interest which defendant has in the money in question, by the Lord Chancellor's order, cannot be charged under that section, having regard (amongst other circumstances) to the nature

of the Suitors' fund, as created and regulated by statute, that it is a fluctuating fund, and that though, in the name of the Accountant-General of the Court of Chancery, it is not to the credit of any cause or matter pending in that Court. If it were necessary, for the purpose of the present application, to decide this second question, I should be of opinion that the charging order of December last was valid in that respect also. *Prima facie* the case falls within the terms of the 135th section, as the defendant, under the Lord Chancellor's order, is entitled to a certain sum, payable out of a fund standing in the name of the Accountant-General. The objection as to the fluctuating nature of the fund was relied on in the case of *Witham v. Lynch (a)*, where so much doubt was expressed by the Court of Exchequer as to the validity of a charging order, upon an annuity or pension payable to the late Master Lynch out of the Suitors' fund in England. But that objection does not, I think, exist in the present case, because, under the statute 19 & 20 Vic., c. 92, s. 28, any deficiency out of the Suitors' fund, in *Ireland*, is to be made good out of the Consolidated Fund. In that case, also, the charging order was made under the English statutes, 1 & 2 Vic., c. 110, and 3 & 4 Vic., c. 82, which do not give the power of charging a debtor's interest in "*money*." In my opinion, however, it is not necessary for this Court, on the present occasion, to decide this latter question. Any payment under the charging order of December last can only be enforced by an application to the Lord Chancellor; and, even if our opinion on this latter question was not in plaintiff's favour, I think we should leave the question of the validity or invalidity of the charging order, by reason of the nature of the Suitors' fund, and of the control which the Lord Chancellor or Court of Chancery exercises over it, to be decided by the Lord Chancellor. A similar course was adopted by the Court of Exchequer, in *Witham v. Lynch*, upon the grounds, as stated by Chief Baron Pollock, that there was sufficient doubt to induce them to let the charging order stand; that if they set it aside they would conclusively prevent

T. T. 1859.

*Queen's Bench.*QUIN
v.

O'KEEFE.

(a) 1 Exch. Rep. 391.

T. T. 1859. the question from being taken to a Court of Appeal, and that if
Queen's Bench the order was not good, it might be set aside by another Court.
 QUINN
 v.
 O'KEEFE. For these several reasons, I think the present application should
 be refused.

HAYES, J.

In this case, two questions have been argued at the Bar; one with respect to the nature of the Suitors' Fee-fund, as to which, I have only to say, that I concur in the judgments pronounced by the other Members of the Court. I think the words of the Act of Parliament are sufficiently comprehensive to include this fund. But then comes the other question, upon which, I confess, I do not entertain so clear an opinion as my LORD CHIEF JUSTICE and my Brother O'BRIEN appear to do; namely, assuming the Suitors' Fee-fund to be, from its nature and constitution, within the purview of section 135, whether, where that fund is "money," it has been made the subject of legislation, so as to be affected by a charging order under this section? Now, as has been said by the other Members of the Court, this 135th section consists of three branches. The first, I may call the conditional branch; the second, the legislative, and the third, the exceptional. I quite concur in the observations of my LORD CHIEF JUSTICE, that, upon a review of the previous sections, from section 131 down to section 135, it is plain, aided as we are by the first or conditional branch, that it was the intention of the Legislature to legislate with respect to money; and I also think it plain that, with respect to the third, or exceptional branch, the Act of Parliament speaks as if it had legislated with respect to money, which it enumerates amongst the other matters with which confessedly it had dealt in the second branch of the section. But it is that second branch of the section which occasions the difficulty which I feel in this case. Unless we can say that the statute has legislated in this section with respect to money, it is not sufficient for us to say that it was intended so to do. The question then is, has this section legislated with respect to money? Now, were it not that the other Members of the Court differ from me, it would appear to me to be pretty

clear that it has not; and I have been anxiously waiting to hear some case cited, where the Court has supplied, in the enacting clause, a word which has been plainly omitted from it. *Wainwright's case* (a) has been cited and strongly relied upon; but that case, in my opinion, does not come up to the present. There the 3 & 4 W. 4, c. 74, s. 83, expressed a clear intention that a protector of the settlement should be provided in all those cases of disability enumerated in the section. The words of that section, which have been referred to, are:—"If any person, protector of a settlement, shall be convicted of treason, or felony, or if any person, not being the owner of a prior estate under a settlement, shall be protector of such settlement, and shall be an infant; or if it shall be uncertain whether such last mentioned person be living or dead, then His Majesty's High Court of Chancery shall be the protector of such settlement, in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid." Now, had the section stopped with the words "protector of such settlement," where they last occur, the sense would have been clear enough. I look upon the words which follow, viz., "in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid," as merely expletive. *Wainwright's case*, therefore, does not, I think, square with the present. Feeling, as I do, a difficulty in the construction of this Act of Parliament, I have ventured to express the views which I entertain, which, however, I surrender in deference to the clear opinions pronounced by the other Members of the Court.

Conditional order made absolute.

(a) *Supra*.

NOTE.—See *Underhill v. Longridge* (6 Jur., N. S., 221; S. C., 29 L. J., M. C., 65.)

T. T. 1859.
Queen's Bench
QUIN
v.
O'KEEFFE.

M. T. 1859.
Queen's Bench

MAHONY v. WRIGHT and others.

Nov. 4, 5.

The 1 & 2 **SUMMONS AND PLAINT.**—First count; that the defendants broke and *Vic., c. 28* entered the house and stores of the plaintiff, in the town of Clonmel, (Bakers Act), does not, either expressly or by necessary implication, repeal any part of the Market Juries Acts (27 G. 3, c. 46, *Ir.*, and 28 G. 3, c. 42, *Ir.*), the jurisdiction created by the former Act being super-added to and not substituted for the authority conferred on Market Juries by the latter Acts; and, therefore, market juries are justified, under the Market Juries Acts, in seizing meal mixed with other meal of an inferior quality, and so fraudulently and illegally exposed or made up for sale; and in taking such mixture and the offender before the Chief Magistrate, who is empowered to deal with the case pursuant to the 1 & 2 *Vic., c. 28.*

Second count; that the defendants converted to their own use the plaintiff's goods, that is to say, several lots of oatmeal.

Defence; that before and at the time of the committing of the grievances and acts in the writ of summons and plaint complained of, the defendants were market jurors of the corporate town of Clonmel, in the county of Tipperary, duly returned and sworn to act as such in said town, pursuant to the statute passed in the Session of the Parliament of Ireland which was held in the 27th year of the reign of his late Majesty King *George the Third*, intituled, "An Act for establishing Market Juries in Cities;" and the subsequent statute passed in the Session of the Parliament of Ireland which was held in the 28th year of the reign of his said late Majesty, intituled, "An Act for continuing the Acts relative to Bankrupts, and for revising, continuing and amending certain temporary statutes;" and that, whilst the defendants were such market jurors, the defendants, as such market jurors, at a seasonable hour, to wit, on the 9th day of June 1858, visited a certain store-house of the plaintiff, in the said town of Clonmel, in which store-house provisions, that is to say, large quantities of oatmeal,

Per LEFROY, C. J.—The mere recital in a subsequent statute of an intention to repeal a former specific statute will not operate, by implication, to repeal the former statute. In order to accomplish such a repeal, there must be a clause to that effect in the latter statute.

Per LEFROY, C. J.—More general words in a subsequent affirmative statute, not referring expressly to a former specific statute, are not sufficient to effect a repeal of the former statute, if both statutes can stand together.

were then made up for sale in the said town ; and that the defendants then and there inspected the quality of the said provisions, and found them to be fraudulently and illegally made up, by reason of the admixture therewith of a large quantity of Indian meal, which was not oatmeal, and was of much less value than oatmeal ; whereupon the defendants, then and there, as such market jurors, and in discharge of their duty as such market jurors, seized the said provisions, and carried the same before D. C., then being Mayor and Chief Magistrate of said town ; and the defendants say that, save as aforesaid, they did not commit any of the acts in the said writ complained of ; and therefore they defend, &c.

M. T. 1859.
Queen's Bench

MAHONY
v.
WRIGHT.

Demurrer to the defence.*

Hemphill (with him *R. Armstrong*), for the demurrer.

The plea avers that the oatmeal was mixed with Indian meal ; but Indian meal is not an "unwholesome, or bad" or deleterious substance ; and as to the adulteration of meal, the Market Juries Act, 27 G. 3, c. 46 (*Ir.*), if it extended to *meal*, is repealed by the 1 & 2 Vic., c. 28. The object of the Legislature, in the latter Act, was to enact a complete code of law in Ireland, as to the adulteration of meal and flour ; and ample protection is thereby afforded to the public : ss. 8, 10, 11, 12, 16. The two Acts cannot stand together ; by the former Act, the market jurors are to carry the provisions, and the owner or person exposing them for sale, before the Chief Magistrate, who is thereby "empowered to dispose of such provisions and victuals, and of such person, according to law ;" but by the latter Act, specific penalties and punishments are created : *Rex v. Cator* (a) ; *Rex v. Davis* (b) ; *O'Flaherty v. M'Dowell* (c) ; *Ex parte Warrington* (d).

Secondly, even if the Court should be of opinion that the

(a) 4 Burr. 2026.

(b) 1 Leach, C. C., 271.

(c) 6 H. L. Cas. 142 ; S. C., 4 Jur., N. S., 33.

(d) 3 De G., M. & G. 159, 171 ; S. C., 17 Jur. 430 ; 22 Law Jour., Bank., 33.

* The following points of demurrer were noted for argument.

First.—That the statutes in the defence mentioned are repealed.

Secondly.—That the said statutes, even if in force, do not justify the acts complained of.

M. T. 1859. 27 G. 3, c. 46 (*Ir.*), is not repealed as to meal, by the 1 & 2 Queen's Bench Vic., c. 28, yet the trespasses of which the plaintiff complains are not justified by the 27 G. 3, c. 46 (*Ir.*), or the 28 G. 3, c. 42, by which the former Act is extended to counties of towns and corporate towns in Ireland. The object of the 27 G. 3, c. 46 (*Ir.*), was to prevent the sale of "unwholesome or bad provisions, or victuals fraudulently or illegally made up," that is, food of an unwholesome and deleterious description, injurious to health, which is an offence punishable in a Criminal Court: 2 *East., P. C.*, p. 821; 4 *St. Com.*, 2nd ed., p. 317; but it was not intended by that Act to enable the market jurors to seize wholesome food of an inferior quality.—[O'BRIEN, J. What is the object of the words "fraudulently or illegally made up?"—] They must refer to some law then existing. But, it is not an indictable or criminal offence to mix one kind of meal with another of an inferior quality: *Rex v. Haynes (a)*; although a person purchasing such mixed meal might be entitled to maintain an action for breach of contract or warranty.

J. B. Murphy and *C. Rolleston*, for the plea.

No statute has abolished or abridged the powers of the market juries in Ireland, under the 27 G. 3, c. 46, and the 28 G. 3, c. 42; although it is possible that, as to meal, the 1 & 2 Vic., c. 28, has given cumulative penalties. Two classes of provisions, "sold or exposed or made up for sale," are dealt with by the statutes of G. 3; one, "unwholesome or bad provisions," and the other, "victuals fraudulently or illegally made up." Adulteration is not in express terms mentioned in these Acts, but the adulteration of meal in any manner is expressly prohibited by the 1 & 2 Vic., c. 28, s. 8. These Acts, therefore, are all consistent and may stand together. The 1 & 2 Vic., c. 28, is conversant only with the making and selling of bread, and the materials used for that purpose; its recital shows no intention on the part of the Legislature to repeal the Acts of G. 3: but even if it did so, that would not be sufficient, without a clause

(a) 4 M. & S. 214.

of repeal: *Dore v. Gray* (a); *Lyn v. Wyn* (b). It is a general rule, that subsequent statutes, which add cumulative penalties, and institute new modes of proceeding, do not repeal former penalties and methods of proceeding ordained by preceding statutes, without negative words: *Dwar. on Statutes*, 2nd ed., pp. 532, 533; *Foster's case* (c); *Goldson v. Buck* (d); *Dore v. Gray* (e). The question is to be decided by ascertaining what was the intention of the Legislature as shown by the statutes: *O'Flaherty v. M'Dowell* (f); and all these statutes may be read together consistently, by holding that, under the statutes of G. 3, the market jurors are to be appointed for the public good, to exercise a proper supervision; and that having detected meal fraudulently or illegally exposed or made up for sale, they are bound to seize the meal, and carry it and the prisoner or person selling it before the Mayor, who is to deal with the food and the person brought before him "according to law," that is, pursuant to the 1 & 2 Vic., c. 28, which itself makes such admixtures as the meal in the present case fraudulent and illegal.

E. T. 1859.
Queen's Bench
MAHONY
 v.
WRIGHT.

R. Armstrong, in reply.

It is conceded that, for an important class of objects, the Market Juries Acts are still in force; but some of their provisions have been subsequently and more fully legislated upon as to these latter provisions. The Market Juries Acts are no longer in force. The Market Juries Acts contemplated unwholesome food, such as tainted meat and the like. When those Acts were passed, it was no offence, either by statute or at Common Law, to mix two kinds of meal (both of them fit for food) together. The words "fraudulently or illegally made up" must have referred to some offence then punishable "according to law;" and such admixture not being an offence, the Mayor would have had no power to deal with the case, nor would the market jurors be authorised by the Acts of G. 3 to seize; and therefore, *cadit questio*, for the fraud and illegality, which is averred in the plea, is merely the mixture of

(a) T. B. 358, 365.

(b) Bridg. Rep. 122.

(c) 11 Rep. 63.

(d) 15 East, 372, 377.

(e) *Supra*.

(f) *Supra*.

M. T. 1859.
Queen's Bench
MAHONY
v.
WRIGHT.

oatmeal and Indian meal. But the plea is based solely on the statutes of *G. 3*; and it is not competent, therefore, for the other side to rely on the 1 & 2 *Vic.*, c. 28; and if so, how can the defendants justify under the statutes of *G. 3*? But even if it were open to the defendants to justify under the 1 & 2 *Vic.*, c. 28, the plea is bad, for not averring that they duly swore informations before the Mayor, to enable him to act. Assuming, however, that the plaintiff was guilty of an indictable offence under the statutes of *G. 3*, yet a new penalty and punishment is created by the 1 & 2 *Vic.*, c. 28; and the latter statute therefore repeals the former: *Bramston v. The Mayor of Colchester* (a). This is proved conclusively by the 8th, 10th and 11th sections of the latter Act.

Cur. ad. vult.

LEFROY, C. J.

Nov. 5.

This case comes before the Court on demurrer to the defence. The action is one of trespass, for breaking and entering the plaintiff's store, and seizing his oatmeal; and the defence is, that the defendants, as market jurors, armed with proper authority for that purpose, and acting in discharge of their duty, entered the store in question, inspected the oatmeal, and found it to be "fraudulently and illegally made up," by reason of the admixture of a large quantity of Indian meal, which was not oatmeal, and was of much less value than oatmeal; whereupon, as was the duty of the defendants, they seized the mixture. The plaintiff demurs to the defence, and of course he thereby admits the statements in the defence, with their legal consequences. The grounds upon which it is contended that the defence is bad are, first, that the statutes of *G. 3*, under which the defendants acted as market jurors, are either wholly repealed by the 1 & 2 *Vic.*, c. 28, or, secondly, that, at all events, they are partially repealed, as to the subject-matter of this action. Now I think it is only necessary to look at the statutes which constitute the authority of market jurors, the 27 *G. 3*, c. 46 (*Ir.*), and 28 *G. 3*, c. 42 (*Ir.*), and at the 1 & 2 *Vic.*, c. 28, which, it is contended, operates as a repeal of the former statutes, at all events as to the

(a) 6 El. & Bl. 246; S. C., 2 Jur., N. S., 809; 25 Law Jour., M. C., 73.

subject-matter of this action ; and we find that, instead of the former Acts being repealed by the latter, the former are distinct Acts, and the subsequent Act is a beneficial amendment of the former Acts, and calculated to supply their defects ; and it would be a very great inconvenience to the public if we were constrained to hold that the market jurors, whose duties are of such vast importance to the public, have no jurisdiction as to this species of fraud. The 27 *G. 3*, c. 46 (*Ir.*), which is extended by the 28 *G. 3*, c. 42, to corporate towns in Ireland, recites that, "from the great increase of "inhabitants in the cities of this kingdom, the Magistrates of said "cities cannot so strictly attend to the inspection of the markets "as usual." Here, then, is a great public object to be attained ; and the statute then proceeds to make provision for the constitution of market juries, and to specify their duties ; and it imposes a penalty upon any person summoned and returned to act as a market juror, who refuses or neglects to accept the office, and to discharge its duties. The discharge of these particular duties, therefore, is no longer left to the option or to the voluntary vigilance of the Magistrates ; for the 27 *G. 3*, c. 46, makes it incumbent on those who are returned as market jurors to accept the office, and to discharge its duties. The office is one of great value to the public, and is, for the reasons for which it was instituted, just as important now as ever ; for Magistrates have not more leisure now than they had when the statutes of *G. 3* were passed, to attend to the duties which, by those statutes, are cast upon the market juries. Therefore, if we were at liberty to look at the circumstances of the case, both public convenience, and the continuance of the mischief which it was the object of the statutes of *G. 3* to guard against, present every reason against the constructive repeal of the Market Juries Acts. However, if they are repealed, either expressly or by necessary implication, the public must suffer. It is observable that the 1 & 2 *Vic.*, c. 28, does not refer to the statutes of *G. 3*, which were thereby intended, as the defendant contends, to be repealed ; on the contrary, it recites an English Act passed, not for the purpose of suppressing generally the fraudulent adulteration of provisions, but to prevent frauds being practised as to bread, and the materials for, and mode of making

M. T. 1859.
Queen's Bench
 MAHONY
 v.
 WRIGHT.

M. T. 1859.
Queen's Bench
 MAHONY
 v.
 WRIGHT.

and selling bread; and, although that is an object of great importance to the public, it is one of a very limited nature in comparison with the extensive jurisdiction conferred upon market juries as to provisions of all kinds. The 1 & 2 *Vic.*, c. 28, then recites that it is expedient to assimilate the law in England and Ireland, as to making and selling bread, and the adulteration of meal, flour or bread; and, with that object, it repeals all Acts then in force in Ireland, "as to the making and selling of bread, or the assize and "price thereof, or the punishment of persons who shall adulterate "meal, flour or bread, or sell bread deficient in weight." And the Act then enacts that "the several bakers or sellers of bread in Ireland" may make and sell bread of certain specified descriptions of grain or potatoes, and mixed with certain specified ingredients, but with no other ingredients, and subject also to the regulations of the statute (section 2). The Act then proceeds in detail to impose certain duties on every baker or seller of bread in Ireland, in order to guard against fraud in the making or selling of bread. But then it is argued that the 8th section of this Act (1 & 2 *Vic.*, c. 28) operates impliedly as a repeal of the Market Juries Act, as to the sale of adulterated corn, meal or flour. It is conceded that there is no express repeal of these Acts, and no reference whatever to them in the 1 & 2 *Vic.*; but, it is contended, that it repeals them by implication.—[His Lordship here read the 1 & 2 *Vic.*, c. 28, s. 8].—The defendant contends that the implied repeal is effected, as to the subject-matter of the seizure in the present case, by this section being read in connection with the 1st section, which repeals all Acts then in force in Ireland relating "to the punishment of persons who shall adulterate meal, flour or bread." But it is settled by authority that the recital of an intention merely, in a subsequent statute, to repeal a former specific statute, will not operate by implication to repeal the former statute, and that, in order to effect such a repeal, there must be a clause of repeal in the repealing statute. Secondly; it is also quite settled, that mere general words in a subsequent affirmative statute, not referring expressly to a former specific statute, are not sufficient to repeal such former statute, if the two statutes can stand together. Now there is not one of these

grounds which will authorise the Court in the present case to hold that the 1 & 2 *Vic.*, c. 28, repeals any part of the Market Juries Acts; and, if we were at liberty to collect the presumed intention from the circumstances of the case, there is everything against the presumption that the Legislature intended to repeal so useful an institution as market juries, since all the reasons which render the establishment of market juries necessary exist at this moment as strongly as when the statutes of *G. 3* were passed. It is urged, however, that a special jurisdiction has been given to the Magistrates, by the 1 & 2 *Vic.*, c. 28,* to proceed by summons and by information, and that this is an implied repeal of the former Acts; but there is no reason why the Legislature, by conferring this jurisdiction on Magistrates, and leaving it optional with any person to call them into action, should be supposed to have thus indicated an intention to oust the jurisdiction of the market jurors, who are set apart on behalf of the public, to search out and discover frauds of this description. There is no reason why this new jurisdiction conferred upon Magistrates should not be superadded to the authority previously given to the market juries, and as cumulative to, instead of superseding, the functions of the market juries. Another argument urged on the part of the plaintiff was, that no specific punishment was given by the 27 *G. 3*, c. 46, for offences under that Act; but it must be remembered that the market juries had nothing to do with the punishment; their duty is merely to ascertain when meal has been fraudulently or illegally made up for sale, and, when they have done so, they are to seize it, and to bring it and the offender before the Magistrates, whose duty it is to deal with the case "according to law." It may be difficult to say what proceedings on the part of the Magistrates would, in the present case, be authorised under the 27 *G. 3*; but, if there be any defect in that statute in this respect, the statute is amended, and not repealed, by the 1 & 2 *Vic.*, c. 28, which inflicts a fixed penalty, and gives a more accurate specification of the mixture which the Legislature terms fraudulent and illegal, and which makes it an offence to put into meal, which is for sale, any ingredient or mixture of

M. T. 1859.
Queen's Bench
MAHONY
v.
WRIGHT.

* Sections 8, 17, 18.

M. T. 1859,
Queen's Bench

MAHONY

v.

WRIGHT.

a quality not equal or superior to the meal with which it is mixed. When, therefore, the 1 & 2 *Vic.*, c. 28, was passed, which made such mixture an offence, it became a fraudulent and illegal mixture, which it was the duty of the market jurors to seize, and a duty which they were bound to discharge, as much as if such admixture had been specifically pointed at by the Act which constituted market juries. We are, therefore, of opinion that the 1 & 2 *Vic.*, c. 28, does not repeal the 27 *G. 3*, c. 46, in any respect, but, on the contrary, is an important supplement and cumulative addition to the statutes of *G. 3*, in order to remedy defects existing in those statutes, as to matters which are peculiarly the subject of legislation in the 1 & 2 *Vic.*, c. 28.

O'BRIEN, J.

I concur in the judgment of my LORD CHIEF JUSTICE. The grounds which have been taken in support of the demurrer are two. First; it is said that the statutes constituting market juries did not authorise the acts complained of; and, secondly, that such a mixture of oatmeal as that in the present case was not contemplated by the Market Juries Acts. As to the first ground, the words of the 27 *G. 3*, c. 46, s. 1, as to provisions, are, "fraudulently and illegally made up" for sale; and it would be a most narrow construction to hold that those words referred only to that which was a fraudulent and illegal mixture when the statute was passed, and that it was, therefore, not competent for the market juries under that Act to seize a mixture which, by a subsequent statute, was made fraudulent and illegal. When the market jury has seized the provisions, their duty is to carry them before the Chief Magistrate, who is to dispose of them "according to law;" that is, their duty is to put the matter into a proper train for investigation, to ascertain whether the mixture was, at the time they seized it, fraudulent and illegal, not whether it was so when the Market Juries Acts were passed; so that, even assuming that the admixture was not an offence under the Market Juries Acts, yet it is a fraudulent and illegal admixture under 1 & 2 *Vic.*, c. 28; and then, in that state of the law, it was the duty of the market jurors to seize the provisions, and bring them

before the Magistrate, to be dealt with according to law. It is not necessary for us to consider whether, under the Acts of *G. 3*, this was a criminal offence or not, because the Act of the 1 & 2 *Vic.* supplies that defect, if it existed, in the former Act, and expressly makes such an admixture of meal as that in the present case an offence. Then, as to the second ground; it is contended that the Market Juries Acts are partly repealed by the 1 & 2 *Vic.*, c. 28. Now there may be ground for holding that a subsequent statute repeals a former one, where different punishments are provided by the two Acts; but that is not so where one Act constitutes a particular body of persons, and authorises them to seize goods, and the other Act empowers the Magistrates to deal with the articles so seized. There is nothing inconsistent in that. I am clearly of opinion that the mixture of the meal for sale in the present case was fraudulent and illegal, and that the seizure by the market jury was authorised by the Market Juries Acts.

M. T. 1859.
Queen's Bench
MAHONY
v.
WRIGHT.

HAYES, J.

There are two distinct duties in respect of bringing offenders to justice, which devolve on Justices of the Peace, and this has been, not only in modern times, but ever since the institution of the office. The first is, that they shall act as inquirers and discoverers, for the purpose of making the suspected offender amenable to justice; this power they have, in common with every conservator of the peace, from the highest Magistrate down to the constable. Their second duty begins where the first ends, and consists in taking the further steps necessary for bringing the offender to trial and punishment; and this is done, either by a summary administration of the Criminal Law, or by committing or binding over the party, and thus putting the matter into a train for adjudication by a superior tribunal. Now, we may well suppose that the Legislature, in passing the 27 *G. 3*, c. 46 (extended by the 28 *G. 3*, c. 42), considered that the Magistrates were unable, from the multiplicity of their duties, want of time or other causes, to discharge properly the former of these duties. Market jurors were therefore appointed to act in that branch of duty, and, for that

M. T. 1859.
Queen's Bench.

MAHONY

v.

WRIGHT.

purpose, were invested with authority, in cities and corporate towns, and other places where provisions should be exposed for sale, to enter houses, and to inspect and seize all provisions which they should find to be "fraudulently or illegally made up," and to bring both the provisions and the persons offering them for sale before the Magistrate, to be, by him, dealt with "*according to law*." The market jurors have discharged their duty when they have brought the offence and the offender under the cognizance of the Magistrate, whether the offence be, as it formerly was, indictable; or punishable on summary conviction, as it now is. Possibly the law, in relation to the Magistrate's duty, may have been altered; but, in my opinion, no change has been made, as to the duty of the market juror. It is still his duty to have the goods and persons brought before the Magistrate, and it is for the Magistrate, having the whole case before him, to deal with it "*according to law*." The market jurors are persons taken from that rank in life which is more competent to ascertain and understand what provisions are, and what are not, "*fraudulently or illegally*" made up. Unquestionably, these salutary provisions, as to market juries, continued until the 1 & 2 Vic., c. 28, was passed. But, it is contended, on the part of the plaintiff, that that Act repealed the Market Juries Acts, as to the subject-matter of this seizure. I do not concur in that view. The express repeal of the former statutes is only as to the punishment of certain offenders, saying nothing as to their prosecution; and where the statute, in the 10th section, gives to the Magistrates, on sworn informations, more extensive powers than were reposed in market jurors, I find, in the language there used, nothing which leads me to the conclusion that the functions of this latter body were to be dispensed with.

It is not enacted that the offences there set forth should be dealt with in a certain way, and not otherwise. There is no inconsistency in the earlier statutes, imposing on market juries in cities and corporate towns a duty analogous to that which, by the provisions of the later statute, is imposed on the Justices of the Peace, to be exercised over the whole kingdom. The 1 & 2 Vic., c. 28, contains no negative words to abrogate the duties of market jurors; and,

in my opinion, its provisions are to be read as cumulative with the provisions of the Acts of G. 3.

M. T. 1859.
Queen's Bench.

MAHONY
v.
WRIGHT.

LEFROY, C. J.

I have authority from my Brother PERRIN to say that he concurs in the judgment of the Court.

Demurrer overruled.

GOWING v. WALSH.

Nov. 15.

ACTION for assault and false imprisonment.—First count; that the defendant assaulted plaintiff, &c., and imprisoned and detained plaintiff in custody, to wit, for half-an-hour, contrary to law, and under a false assertion and charge, that the plaintiff had committed some offence punishable by law, whereby plaintiff was injured, &c. Second count; that defendant, on the day and year aforesaid, gave, at the place aforesaid, the plaintiff into custody of two policemen, and unlawfully caused him then to be arrested by two policemen, and unlawfully ordered and caused them to search his person, against his will, under a false charge made by the defendant, that the plaintiff had committed some offence punishable by law, to the plaintiff's damage, &c. The fifth count complained that the defendant again unlawfully gave the plaintiff into the custody of a policeman, and caused him to be detained in

To an action for assault and false imprisonment on a false charge, the defendant pleaded, by way of justification, that an application, by the plaintiff in the present action, for compensation for a malicious burning, had been refused at a Presentment Sessions held at the Court-house of P., of which Presentment Sessions the defendant, before whom informations (pursuant to the 6 & 7 W. 4, c. 116, s. 137) had been sworn by the plaintiff at Petty Sessions, was Chairman; that the plaintiff, after the refusal of the application, was allowed to make copies from the informations, having been first cautioned not to take away the informations; but that, during the temporary absence of the Chairman, in discharge of his duty, the plaintiff was about to leave the Court-house, with the informations in his pocket, when the Chairman, who had then returned to Court, in order to prevent the plaintiff from abstracting the informations, directed a constable, in whose view the whole proceeding had occurred, to take the informations from the plaintiff; that the constable did accordingly detain the plaintiff, and take the informations from him, and that in so doing no unnecessary violence was used, which was the assault and false imprisonment complained of.—*Held*, overruling a demurrer to the defence, that the above justification was a good answer to the action.

M. T. 1859. custody. The sixth count was to the same effect as the fifth count, but alleged, further, that the policeman acted under the orders of the defendant as a Justice of the Peace, and in the presence of the defendant.

Queen's Bench.
GOWING
v.
WALSH.

The defence to the above counts, after averring that the alleged grievances related to one and the same cause of action, and not to other or different causes of action, justified under the provisions of the 12 Vic, c. 16, and stated that, at and just before the time in the said counts mentioned, the defendant was a Justice for the King's County, and on, &c., a Special Presentment Sessions was being holden in the public Court-house of Philipstown, in the King's County, under the provisions of the Act of the 6 & 7 W. 4, c. 116, at which Presentment Sessions the defendant, acting in the execution of his duty, and in his character of a Justice of the Peace for the said county, was presiding as Chairman; and that while the defendant was so presiding as such Chairman, in the said Court-house, the plaintiff brought forward an application for compensation for a malicious burning of his house, under the 135th section of the said statute; and the plaintiff, for the purpose of supporting his application, then and there relied on an information on oath of the plaintiff, and an information on oath of C. L., both of which informations had been previously taken before the defendant, as a Justice of the Peace, at the Petty Sessions of, &c., on, &c., pursuant to the provisions of the said Act of Parliament; and thereby the said informants bound themselves, when called on, to prosecute the said informations, otherwise to forfeit to the Crown the sums of money therein respectively mentioned; that the application was then and there entertained by, and argued before, and decided by, the defendant, who indorsed his opinion on the notice of application, and stated his reasons for disallowing the same; that immediately after the defendant has so expressed his opinion, the plaintiff began to collect (amongst other papers), with the intent of carrying away the same, the said two informations, and that the Secretary of the Grand Jury, having insisted that the plaintiff was not entitled to take away or have the custody of the said informations, the plaintiff's right thereto was discussed in open Court, without objection by the plaintiff, and the defendant decided that the plaintiff was not

entitled to take away or have the custody of said informations; but had a right to take copies thereof, which the plaintiff then requested and obtained permission to do; that, after the plaintiff had been permitted to have the informations in open Court, for the purpose of taking copies thereof, and while he was copying the same, the defendant, in the execution of his duty, accompanied the County Surveyor to inspect another part of the Court-house, whereupon the plaintiff, in the presence of the Secretary of the Grand Jury, and of the constable who had been on duty in Court during the previous proceedings, declared that he would keep the informations, put them into his pocket, and was proceeding to leave the Court-house; that defendant positively refused, on the request of the plaintiff, to give up the informations, and was in the act of walking out of the Court-house with them in his pocket, when the defendant, in order to prevent the abstracting of the informations, and to compel the delivery of the same, directed the constable, in whose presence and view the informations had been abstracted, to detain the plaintiff in the Court-house, and to search him for the informations, and in so doing used no unnecessary violence, and did no unnecessary damage; *quæ sunt eadem*.

M. T. 1859.
Queen's Bench.

GOWING
v.
WALSH.

Demurrer.*

Heron (with him *Macdonogh*), for the demurrer.

The defence admits the averment in the plaint, that the defendant caused the plaintiff to be arrested on a *false* charge, but does not justify that arrest in law. A Magistrate can only authorise an arrest, first, by way of safe custody to answer an offence known to the law;

* NOTE.—The following points were noted for demurrer:—First. That the defence offers no answer in law. Secondly. That the defence offers no justification to an action for false imprisonment. Thirdly. That the defence does not aver that the plaintiff had committed an indictable offence. Fourthly. That the defence does not aver that the defendant caused the plaintiff to be arrested, for the purpose of bringing plaintiff to justice. Fifthly. That the defence justifies the arrest and false imprisonment, by averring that the defendant caused the plaintiff to be arrested, for the purpose of taking documents from the possession of the plaintiff. Sixthly. That the defendant does not aver that he acted on any information, in writing or otherwise. Seventhly. That no legal purpose is averred to justify the arrest of the plaintiff.

M. T. 1859.
Queen's Bench.

GOWING
 v.
 WALSH.

secondly, if he commit for an execution; and, thirdly, if he commit for contempt: *Burns' Just.*, 29th ed., tit. *Commitment* I. The plaintiff in the present case had not committed any offence known to the law, and neither the Magistrate's suspicion of the plaintiff's intention, nor his belief that he was acting in discharge of his duty, can justify the arrest: *Rex v. Wilkes* (a). There was no conviction, warrant, information or complaint in the present case to authorise an arrest: *Rex v. Birnie* (b).—[LEFROY, C. J. The question is, was the plaintiff entitled to take away the informations? and if not, was the defendant justified in causing him to be arrested, and in having the papers taken from him, no more force being used than was necessary for that purpose?—The defence does not justify on the ground that the plaintiff was stealing documents in a Court of Record. A Presentment Sessions is not a Court of Record; and whether the act of the plaintiff was a proper one or not, the Magistrate had no jurisdiction over the plaintiff's person, and is only justified when acting legally: *Caudle v. Seymour* (c).—[PERRIN, J. It would be monstrous to hold that any person could carry off the documents on which the Presentment Sessions is to decide.]

R. S. Foley (with him *J. T. Ball*), in support of the defence.

The documents in question were sworn informations taken at Petty Sessions, pursuant to the 6 & 7 W. 4, c. 116, s. 137, which the Clerk of Petty Sessions is in *no case* to allow out of his possession: 14 & 15 Vic., c. 93, s. 10, par. 4. If the plaintiff had made a false information he would have been guilty of perjury: 6 & 7 W. 4, c. 116, s. 172. The informations, therefore, were records; and by the 9 G. 4, c. 55, s. 21,* the fraudulent taking away of records, including depositions and affidavits, is made a misdemeanour, punishable by transportation; and whilst a misdemeanour continues, or there is a reasonable apprehension of its renewal, even a private person may arrest: *Price v. Seeley* (d); 1 *Burns' Just.*, 29th ed.,

(a) 2 Wils. 151, 158.

(b) 1 Moo. & Rob. 160.

(c) 1 Q. B. 889.

(d) 10 Cl. & Fin. 26.

* NOTE.—This statute, so far as it relates to the summary jurisdiction of Justices of the Peace, is repealed by the 14 & 15 Vic., c. 92, s. 26.

tit. *Arrest* II, p. 268, citing *Hawkins & Hale's P. C.*; *Com. Dig.*, M. T. 1859.
 tit. *Pleader*; 2 *Inst.*, p. 52. The fact of the plaintiff mixing the
 informations with his own papers, and carrying them all off together,
 makes no difference: 1 *Hale P. C.*, p. 513; 2 *East. P. C.*, p. 669.
 The demurrer admits the positive refusal by the plaintiff to give
 up the informations when requested by the defendant to do so, and
 also admits that no greater force was used than was necessary:
Rex v. Milton (a). The constable who made the arrest saw the
 whole proceeding from beginning to end, and the defendant, there-
 fore, was justified in directing the constable to arrest the plaintiff:
Derecourt v. Corbishley (b); *Spilsbury v. Micklethwaite* (c).

Queen's Bench.
 GOWING
 v.
 WALSH.

Macdonogh, in reply.

The defendant was a known person, and if a charge of misde-
 meanour was to be made against him, it must have been on informa-
 tion: *Atkinson v. Carty* (d). The defendant did not see the alleged
 taking away of the informations; but ordered the defendant to be
 arrested on a mere statement, not upon oath. In *Derecourt v.*
Corbishley, a breach of the peace had been committed in the
 presence of the policeman. There is no precedent to be found for
 this defence.—[PERRIN, J. Do you contend that there was no right
 to take the informations away from the plaintiff, if he was carrying
 them off, and to detain him for that purpose?—If that were the
 defence, the pleading is erroneous, the defence ought to have denied
 the imprisonment, and justified the assault.

LEFROY, C. J.

We have no sort of doubt in this case; and if there were no
 precedent we ought to make one, for I do not know how the law is
 to be administered if this demurrer were to be allowed. What are
 the facts of the case? A Presentment Sessions is constituted for
 administering an important part of the law. An application is
 made to the Sessions, by the plaintiff, who had suffered an injury for

(a) *Moo. & Mal.* 107.

(b) 5 *El. & Bl.* 188; *S. C.*, 24 *L. J.*, *Q. B.*, 313; 1 *Jur.*, *N. S.*, 870.

(c) 1 *Taunt.* 146.

(d) 1 *Jebb & Sy.* 369.

M. T. 1859.
Queen's Bench.

GOWING
v.
WALSH.

which the law gives him redress, upon the terms of his affording to the law his assistance to discover the perpetrator of the offence for which he seeks indemnification, and for this purpose the plaintiff made a proper information, on oath, before the proper tribunal (a), and left it in the proper custody. Then, in order to obtain the redress to which the plaintiff claimed to be entitled, he had occasion to appear before the Presentment Sessions, and to have the finding of the Sessions upon his application (b). It happens that the Chairman of the Presentment Sessions was the very Magistrate before whom the informations had been made: but still more, as the presiding Magistrate of the Presentment Sessions, he had a duty to perform in respect to the information. The plaintiff goes before the Presentment Sessions; the application is investigated and refused by the Sessions; and when the Chairman had indorsed the opinion of the Sessions, on the application, as required by the statute (c), an opinion highly important, in respect to the party whose application had been refused, and who, therefore, might not be inclined to come forward and prosecute, as he was bound by that very information to do, for the purpose of effectuating the ends of justice (for if he had sworn falsely in the informations, he might have been prosecuted for perjury, 6 & 7 W. 4, c. 116, s. 172), the Magistrate very properly felt that it was necessary to secure the informations, and was bound imperatively to do so. He finds, however, that the plaintiff had laid hold of them and was about to carry them away; he remonstrates with him, and refuses to allow him to carry off the informations, but tells him that, if he desires it, he will allow him to take copies of them. All this took place actually in the sight of the Magistrate; and if there was nothing more in the case than this, it would abundantly show the plaintiff's purpose and intention to carry away the documents, and thus to frustrate the ends of justice, as well as to commit a gross violation of the respect owing to the Court, and of the statute passed for the purpose of giving further security to records (d).

(a) 6 & 7 W. 4, c. 116, s. 137.

(b) ss. 135, 136.

(c) s. 135.

(d) See 9 G. 4, c. 55, s. 21, and 14 & 15 Vic., c. 93, s. 10, par. 4.

The plaintiff, therefore, in all this proceeding, was grossly violating the law. However the matter did not end there: upon the Magistrate going with the County Surveyor, for a purpose which was not only lawful in itself, but which is averred by the defence to have been the duty of the defendant, and, not leaving the Court-house, the plaintiff, during the Magistrate's momentary absence, takes the opportunity to seize upon the informations, and to keep them in his own custody; and when he is about to quit the Court-house with them, the Magistrate is informed of it, and desires the constable to arrest him and to take the documents from him. We are told that the Magistrate had no right to have the plaintiff arrested; but we are of opinion that the Magistrate was justified in doing so, because the plaintiff was about to depart with these documents which he had no right to take away, which it was a violation of the law in him to take away, and the Magistrate having himself personally had abundant intimation of the purpose of the plaintiff, to assure himself that what the constable stated was perfectly true, namely, that the plaintiff was about to leave the Court-house with the informations, desires the constable to arrest the plaintiff, and to take away from him the documents, which he would not give up voluntarily. The constable discharged his duty in the best manner he could, without injury to the plaintiff's person, and without using any unnecessary violence. Nothing more was done than what the Magistrate was entitled by law to order to be done, and in the doing of which it was absolutely necessary to cause the plaintiff to be detained; but it is not pretended that he was detained an instant longer than was necessary for that which was the legal right and duty of the Magistrate and the constable. I need not go into the cases which were so aptly and properly cited by Mr. *Foley*, and which warrant the course which was pursued here; because there is abundance in the present case itself to justify the arrest and detention of the plaintiff, for the purpose of preventing him from doing that which he had no right to do—which was an offence at law, and which would have enabled him to defeat the ends of justice, and to prevent himself from becoming a prosecutor, as he was bound to be (a). I

M. T. 1859.
Queen's Bench.

GOWING
v.
WALSH.

(a) s. 137.

M. T. 1859.
Queen's Bench.

GOWING
v.
WALSH.

feel that it would be a waste of time to say anything more, in such a case as this, to justify the opinion which we have come to without hesitation; namely, that the detention of the plaintiff was perfectly justifiable, and that the demurrer must be overruled. It was not necessary for the defendant to resort to the Justices of the Peace Protection Act for his justification, for I do not know how the law is to be administered if such a defence were not to be sustained.

O'BRIEN, J.

The defendant says, in reply to the plaintiff's action, it is true I did cause you to be arrested, and that is the supposed trespass of which you complain, but I did so for the purpose of preventing an offence being committed. The defence states that the defendant was walking out of Court with the informations in his pocket, which he had been told by the Magistrate, the Chairman of the Court, not to remove; that the plaintiff, notwithstanding this prohibition, insisted upon doing so, and that, "in order to prevent the abstracting of the informations, and to compel the delivery of them," the Magistrate directed the constable to detain the plaintiff, and to take the informations from him, and that, in doing so, no unnecessary violence was used. I think that both the Magistrate and constable were justified in getting possession of the informations; and, if so, it is only common sense that that could not have been done without detaining the plaintiff. The case of *Derecourt v. Corbishley* shows that it is not material that the Magistrate should actually see the offence committed, because the constable who detained the plaintiff, and who acted by direction of the Magistrate, was justified in what he did.

HAYES, J.

I concur in the judgment of the Court, and in the reasons which have been stated by my LORD CHIEF JUSTICE.

Demurrer overruled.

H. T. 1860.
Queen's Bench.

CAHILL v. HARTNETT.

Jan. 24.

EJECTMENT on title.—Upon the trial at Limerick, before Keogh, J., at the Spring Assizes 1859, the plaintiff recovered a verdict. In the following Term (E. T. 1859), a conditional order was obtained for a new trial, on the ground of surprise, and newly-discovered evidence. The newly-discovered evidence consisted of old patents granted to the Earl of Devon, and discovered since the trial. The defendant produced, on the trial, maps and documents from the same depository in which the patents were also found after the trial.

In ejectment on title, a new trial will not be granted on the ground of newly-discovered evidence, when, by the exercise of due diligence, such evidence might have been obtained and produced at the former trial.

W. W. Brereton and *J. S. Collins* now showed cause, and cited *Doe d. James v. Price* (a); *Cooke v. Berry* (b); *Tharpe v. Stallwood* (c); *Doe d. Kinglake v. Bevis* (d).

Sir C. O'Loughlen and *R. Ferguson*, in support of the conditional order.

LEFROY, C. J.

The principle which governs motions of this sort is so well established, that my difficulty is, to see how the present case is to be an exception. The general rule is, not to grant a new trial on the ground of surprise, nor on the ground of newly-discovered evidence, unless in fact there appears to have been actual surprise, or unless due diligence was used before the trial in searching (though ineffectually) for the evidence which is afterwards relied upon as newly-discovered evidence. But it is impossible, in the present case, to say either that there was surprise, or that due diligence was used in searching for this new evidence. The new

(a) 1 M. & Ry. 683, 688.

(b) 1 Wils. 98.

(c) 6 Scott, N. R., 715, 730.

(d) 7 C. B. 456, 513.

H. T. 1860.
Queen's Bench.

CAHILL
v.

HARTNETT.

evidence comes from the same source which was open to the defendant for the trial which has taken place; the defence was conducted by the same attorney, on behalf of the same parties, and who procured evidence from the same source. One reason for the general rule, which inclines the Court against granting a new trial, on the grounds which are now relied on, is, that a party is not to be encouraged to wait until he sees his adversary's case, and afterwards to bring forward evidence to meet that case where it pinches him, instead of coming forward to meet it in the first instance (I am only now adverting to the reason for the general rule, and not to what has been done in the present case); and another reason for the general rule is, in order to prevent the increase of litigation by re-investigations of the same case. The maxim of law is, "*interest reipublicæ ut sit finis litium.*" There are no grounds to take the present case out of the general rule; and, therefore, as it affords no reason why it should be excepted from the rule, we must allow the cause shown against the conditional order for a new trial.

O'GRADY v. DWYER.*

Jan. 26.

In ejectment on title, a new trial will not be granted on the ground of newly-discovered evidence, when the party applying for the new trial was, before the former trial, aware of the existence of the evidence, and might, on a proper application for that purpose, have obtained a reasonable postponement of the former trial until he had obtained such evidence.

EJECTMENT on title.—Upon the trial, before Keogh, J., at Lime-rick, at the Summer Assizes 1859, the plaintiff proved that the defendant held the land in question for one year only, which had expired. On cross-examination, the plaintiff was asked whether he had not himself described the defendant as a yearly tenant, in a proposal in writing to a Cattle Insurance Company? to which he replied that he did not remember doing so. The defendant's case was, that he was a yearly tenant, and had not been served with a writ, and might, on a proper application for that purpose, have obtained a reasonable postponement of the former trial until he had obtained such evidence.

Rules by which the Court is governed as to granting a new trial on the ground of newly-discovered evidence. The Court is slow to relax such rules in cases of ejectment on title.

* PERRIN, J., *absente*.—HAYES, J., was sitting at Nisi Prius.

with a notice to quit. The jury found for the plaintiff. A conditional order had been obtained, last Term, for a new trial, on the ground of newly-discovered evidence; it appearing by affidavit that the new evidence was the proposal to the Insurance Company, which had been filled up in the handwriting of the plaintiff, for the defendant, and in which the defendant, in answer to the query concerning his tenure, was described as "a yearly tenant of the lands." The answers to others of the queries stated in the proposal were not accurate, the defendant being described in another of the answers as "owner" of the lands. It also appeared that the attorney for the defendant had applied, before the trial, to the Insurance Company, for the proposal, but did not receive it until after the trial had taken place.

H. T. 1860.

Queen's Bench

O'GRADY

v.

Dwyer.

Sir C. O'Loughlen (with him *E. Sullivan*) now showed cause.

J. Clarke and *James Murphy*, in support of the conditional order.

Sullivan was not called on to reply.

LEFROY, C. J.

This is a motion to set aside a verdict had for the plaintiff, in an action of ejectment on the title, upon the ground of newly-discovered evidence. The practice of granting new trials on newly-discovered evidence was, I may say, imported into Courts of Law from the Courts of Equity, where a bill is entertained to review and reverse a decree, on the ground of newly-discovered evidence. It may not, therefore, be immaterial, in considering this question on principle, to see what was understood in the Courts of Equity by the terms "newly-discovered evidence." It meant evidence discovered *since* the former decision; and that was founded, perhaps, on this ground, amongst others, that the Courts, both of Law and Equity, hold it to be a sound and important principle of public convenience to diminish litigation as much as possible, and not to encourage it, and, therefore, hold that parties should not go to trial until their case was prepared with all due diligence. This principle is founded on the maxim *interest reipublicæ ut sit finis litium*. Another

H. T. 1860.

Queen's Bench

O'GRADY

v.

Dwyer.

principle, which is involved in these cases, and a principle which perhaps makes it of even more importance to the public why we should hold fast to the rule of Law in considering whether a second trial ought to be allowed on newly-discovered evidence, is, that if a party is permitted to go to trial, and to ascertain what his adversary's case is, it furnishes an opportunity and a temptation to meet that case by undue means, under the mask of newly-discovered evidence (although I do not mean to say that that is the fact in the present case). That is in itself a reason why the Court should be jealous and vigilant in granting a new trial upon this ground. There is also a third principle, which has been equally adopted in the Courts of Law as much as in the Courts of Equity, viz., that the evidence which is called the newly-discovered evidence should not only have been newly-discovered since the trial, but should also be evidence which, by no reasonable diligence, could have been discovered before the trial, and, above all, that it should not be evidence of which the party was cognisant, and to which he might have had access before the trial. Upon this principle *Cahill v. Hartnett* (a) was decided in this Court, a few days since, in which case the party applying for the new trial had access to the place where the patents which constituted the newly-discovered evidence were kept; and, if he had searched with due diligence, he might have found them there before the trial. Besides these three principles, it is also necessary that the newly-discovered evidence should not be merely such as will give the party applying for a new trial a *chance* of gaining a verdict; on the contrary, it must be new evidence of such a character as that, if true, it would reverse the former decision of the jury. In looking at the present case, we fail to find any one of these ingredients, every one of which it concerns the public safety and convenience to adhere to; not one of them exists in the present case. The defendant was aware of the existence of the document; he had taken measures before the trial to get it, and if, before he disclosed his case, he had applied to the Judge below for a postponement, on the ground that he had not received an answer to the letter which he had written

(a) See *ante*, p. 439.

to the Insurance Company for this document, the Judge would have postponed the trial; and, in that event, there need not have been a re-investigation. But, as to this newly-discovered evidence, which is now relied upon, it is a document made *diverso intuitu*, not signed nor written with a view to determine between the plaintiff and defendant that they were about to constitute a new tenancy. Can it be suggested for a moment that they intended to bind their rights by that instrument? It cannot be so suggested; and are we to assist the party who has now got this document into his possession, to make use of it for the purpose of subverting the judgment which the plaintiff has obtained, by putting the document to a purpose wholly different from that for which it was intended? Would not that be almost to enable the document to be used for a fraudulent purpose? All the circumstances of the case run with the verdict. The agreement and written receipts all show a simple holding for a year. There is no ground, therefore, in this case for relaxing the rule, or departing from it, to prevent a possible injustice; on the contrary, all these circumstances go with the verdict and the judgment. Another circumstance, which is always important to be considered in these cases, is this, the defendant is not without remedy; he may bring his ejectment, on the other hand; and the Court, therefore, should be slow to relax a safe rule in such a case as the present.

H. T. 1860.
Queen's Bench.

O'GRADY
v.
DWYER.

M. T. 1859.

Common Pleas.

JOHN M'MAHON

v.

Sir THOMAS BARRETT LEONARD, Bart., and others.

*(Common Pleas).*Nov. 16, 17,
25.

In an action by A against B, where the Court of Common Pleas had overruled the exceptions taken to the Judge's charge, the Court of Exchequer Chamber afterwards reversed their judgment, allowing some of the exceptions; whereupon A, the plaintiff in error, brought error in the House of Lords. Pending the proceedings in Parliament,

THIS was an application to restrain the defendants from levying execution upon a writ of *ca. sa.*, issued to recover costs, in pursuance of an order of the House of Lords.

An action had been brought by the plaintiff to recover damages against the defendants for disturbing him in his office of weigh-master in the town of Clones. The action was tried before the CHIEF JUSTICE of the Court of Common Pleas, and the plaintiff obtained a verdict; the defendants excepted to the charge of the learned Judge; but, upon argument of the bill of exceptions, the Court overruled the exceptions, and gave judgment for the plaintiff. The defendants then brought a writ of error in the Court of Exchequer Chamber, and the judgment given by the Court of Common Pleas, in favour of the plaintiff, was reversed, and a *venire de novo* awarded, some of the exceptions to the charge of the learned Judge

B, the defendant in error, presented a petition to quash the writ of error, which application was disallowed. The House of Lords afterwards made an order, that "the record should be remitted, to the end that such proceedings may be had thereupon as if no such writ of error had been brought into this House." It then directed that "the said plaintiff in error do pay, or cause to be paid, to the defendants in error the costs incurred in respect of the said writ of error, including the costs of the said petition of the defendant in error, &c., the amount of said costs to be certified by the Clerk of the Parliaments." It was subsequently ordered, "that the said defendants in error do recover against the said plaintiff in error £543. 1s. 4d., &c., for his costs, &c., by reason of the delay of the said judgment of reversal, &c., and also of the proceedings aforesaid, to the end that execution should be had thereupon." The record having been remitted to the Exchequer Chamber, and thence to the Common Pleas, the officer of the Court, without further order, permitted the defendant in error to issue execution against A for the amount of these costs. A, having paid the amount, under protest, applied to the Court to set aside the writ of execution, upon the ground that the House of Lords had no jurisdiction to include in their order the costs of the abortive petition of the defendants in error, and that there was no order of this Court awarding execution.—*Held*, that this Court was absolutely bound by the order of the House of Lords.

Held also, that execution was issuable immediately upon the return of the record, with the Lords' order, without further order of this Court.

having been allowed, and the rest overruled. The plaintiff then brought a writ of error upon the judgment of the Court of Exchequer Chamber, in the House of Lords, for the purpose of affirming the judgment of the Court of Common Pleas. Prior to the argument of the writ of error in the House of Lords, the defendants presented a petition to that House, praying that the writ of error so brought upon the judgment of the Court of Exchequer Chamber should be quashed, as not lying from a judgment awarding a *venire de novo*; or, if not, that the defendants should be at liberty to file a special joinder in error, for the purpose of relying upon some of the exceptions (and abandoning others), in support of the judgment of the Court of Exchequer Chamber. This petition having been argued by one Counsel at each side, the House delivered an unanimous opinion that a writ of error did lie upon a judgment awarding a *venire de novo*; and that the defendants should be at liberty to rely upon any of the exceptions in support of the judgment of the Court of Exchequer Chamber, reserving the question of costs, upon the defendants' petition, for the hearing of the argument upon the writ of error at the Bar. The case came on for argument upon the 7th of February 1857; and upon the 16th of July 1858, the House of Lords made an order that the judgment of the Court of Exchequer Chamber should be affirmed, and that the record should be remitted, in order that such proceedings might be had as if no such writ of error had been brought in the House of Lords; and that the plaintiff should pay to the defendants the costs of the writ of error in the House of Lords, including the costs of the defendants' petition, when the amount of such costs should be certified by the Clerk of the Parliaments; and subsequently the House of Lords made a further order, which appeared upon the transcript as follows:—

“And it is further considered by the same Court of Parliament,
 “that the said Sir Thomas Barrett Leonard, Bart., Nicholas Ellis,
 “Henry Whiteside and Robert Irwin, do recover against the said
 “John M'Mahon £543. 1s. 4d., by the same Court of Parliament
 “aforesaid adjudged to the said Sir Thomas Barrett Leonard,
 “Bart., &c., and with their assent, according to the form of the
 “statute in such case made and provided, for their costs, charges

M. T. 1859.
Common Pleas.
 M'MAHON
 v.
 LEONARD.

M. T. 1859. "and damages, which they have sustained by reason of the delay
Common Pleas. "of execution of the said judgment of reversal, on pretext of pro-
 M'MAHON "secuting the writ of error aforesaid in the House of Parliament
 v. "aforesaid; and hereupon the record aforesaid, &c., and also the pro-
 LEONARD. "ceedings aforesaid had, in the same Court of Parliament, in the
 "premises, are remitted, by the same Court of Parliament, to the
 "Exchequer Chamber in that part of the United Kingdom of Great
 "Britain and Ireland called Ireland, *to the end that execution may*
"be had thereon."

It further appeared upon the transcript, that upon a subsequent day a petition was presented by the plaintiff, praying that the House might amend their judgment, by striking out so much thereof as awarded to the defendants the above sum of £543. 1s. 4d.; but that their Lordships refused to comply with the prayer of that petition. A transcript of the judgment was accordingly remitted to the Court of Exchequer Chamber in Ireland, and subsequently to the Court of Common Pleas. A writ of *ca. sa.* having issued from the Court of Common Pleas, to enforce payment of the above sum, this application was made to set it aside, upon the grounds (amongst others) that the order of the House of Lords was founded upon error in fact; that it was an interlocutory order, upon which execution could not issue, and that there was no judgment of the Court of Common Pleas existing to ground such writ of execution.

Maedonogh, in support of the application.

The House of Lords is not bound by its own judgment, when founded upon error in fact, nor is an Inferior Court bound to follow such judgment: *Paul v. Joel* (a), citing *Bright v. Hutton* (b); and, therefore, the order of the House of Lords, for payment of these costs to the defendants, purporting to be founded upon the statute in such case made and provided, viz., 3 H. 7, c. 10 (2), extended to Ireland by Poyning's Law, is founded upon error in fact, that statute not applying to the case then before the House of Lords, and being only applicable when "delay of execu-

(a) 3 Exch. 432.

(b) 3 H. of Lords, 341.

tion" was sustained by the *plaintiff*. The defendants could suffer no "delay of execution" in the present case, being in possession of no judgment upon which execution could issue: *Sutherland v. Willis* (a). He also cited 13 *Car.* 2 (stat. 2), s. 10; *Baring v. Christie* (b); 8 & 9 *G.* 3, c. 13, s. 2; *Williams v. Smith* (c); *Moon v. Durden* (d); *Lickbarrow v. Mason* (e); *The Bank of Ireland v. The Trustees of Evans' Charities* (f); the Common Law Procedure Act (1856), s. 49; *Stanford v. Robinson* (g); *Herbert's case* (h); *Cassidy v. Steward* (i); *Bac. Abr., Execution*, p. 399 (E).

M. T. 1859.
Common Pleas.
M'MAHON
v.
LEONARD.

Whiteside and *Joy*, contra, cited *Harrison v. Stickney* (k); *Tommey v. White* (l), citing *M'Gavin v. Steward* (m); the Common Law Procedure Act (1858), s. 176; *Long v. Barrett* (n); the Common Law Procedure Act (1856), s. 47; *Doe v. Amey* (o); *Arch. Prac.*, pp. 517, 622; *M'Mahon v. Leonard* (p).

Macdonogh, in reply, referred to *Arch. Prac.* (by *Chitty*), p. 119; *Anderson v. Fitzgerald* (q); *Trimleston v. Kemmis* (r); 2 *Tidd*, p. 1180; 3 & 4 *Vic.*, c. 105, s. 27; *Erdy v. Martin* (s); *Harvey v. Francis* (t); *Tidd's Forms*, p. 546.

Cur. ad. vult.

MONAHAN, C. J.

In this case an application has been made by the plaintiff to set aside a writ of *ca. sa.* that issued out of this Court for the sum of £543. 1s. 4d. We have before us, on the present motion, the writ

Nov. 25.

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| (a) 5 <i>Exch.</i> 981. | (b) 5 <i>East</i> , 545. |
| (c) 2 <i>Hurl. & Nor.</i> 446. | (d) 2 <i>Exch.</i> 40. |
| (e) 6 <i>T. R.</i> 131. | (f) 4 <i>Ir. Com. Law Rep.</i> 624. |
| (g) 3 <i>M. & G.</i> 407. | (h) 3 <i>Rep.</i> 12 a. |
| (i) 2 <i>Sc., N. R.</i> , 438; 8. C., 9 <i>Dowl.</i> 377. | |
| (k) 2 <i>H. of Lords</i> , 130. | (l) 3 <i>H. of Lords</i> , 69. |
| (m) 4 <i>Wil. & Shaw</i> , 184. | |
| (n) 7 <i>Ir. Com. Law Rep.</i> 439; 8. C., in Error, 8 <i>Ir. Com. Law Rep.</i> 331. | |
| (o) 8 <i>M. & W.</i> 565. | (p) 6 <i>H. of Lords</i> , 1010. |
| (q) 4 <i>H. of Lords</i> , 516. | (r) 9 <i>Cl. & Fin.</i> 770. |
| (s) 8 <i>Dowl. P. C.</i> 343. | (t) 7 <i>Dowl. P. C.</i> 194. |

M. T. 1859.

Common Pleas.

M'MAHON

v.

LEONARD.

of execution itself; and it appears that, pending the notice of motion, Mr. M'Mahon paid the amount to the Sheriff, under protest; but the fact of payment in that way does not prevent the question being now raised, as to whether the execution should be set aside. The writ of execution recites in substance a judgment of the House of Lords; and the short history of the case is this:—Mr. M'Mahon, as plaintiff in an action, sought to recover damages against the defendants, for disturbing him in his office of weighmaster in the town of Clones. The case was tried before me in this Court, and the plaintiff, Mr. M'Mahon, obtained a verdict. Exceptions were taken to some points ruled by me at the trial, and were argued in this Court. We overruled them on argument, and pronounced judgment in favour of Mr. M'Mahon. The defendants, however, proceeded by writ of error in the Court of Exchequer Chamber in this country, then consisting of twelve Judges, not, as at present, of seven; and the result was, that the majority of that Court being of opinion that some of the exceptions to my direction at the trial were well founded, reversed the judgment of this Court, and allowed some two or three of those exceptions; and, according to the practice of the Court of Exchequer Chamber, they remitted the record to this Court, to award a writ of *venire de novo*. Mr. M'Mahon then brought a writ of error in the House of Lords, endeavouring to uphold the judgment of the Common Pleas; and it appears, on the record before us, that, after these proceedings were sent to the House of Lords, the defendants applied to the House of Lords to quash the writ of error, upon the grounds that no writ of error lay to Parliament, from a judgment awarding a *venire de novo*. That motion appears to have been discussed before a Committee of the House of Lords, which decided that Mr. M'Mahon had a right to bring his writ of error, and ordered the defendants to join in error. The case was afterwards argued at great length in the House of Lords. Their Lordships affirmed the judgment of the Exchequer Chamber, with costs, which were taxed by the proper officer of the House of Lords to the sum of £543. 1s. 4d. It is for this sum that the execution sought to be set aside has issued; and the question now is, whether we should set aside the execution? From an

inspection of the records of our own Court, we find that when the proceedings in the House of Lords were remitted to the Exchequer Chamber, and from the Exchequer Chamber to this Court, that the proceedings so remitted were entered on our own record not as a judgment of this Court, but of the House of Lords; and the curial part of the judgment so entered is as follows:—"It is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, that the said judgment given in the said Court of Exchequer Chamber in Ireland, reversing the said judgment given in the said Court of Common Pleas in Ireland, be, and the same is hereby, affirmed, and that the record be remitted, to the end that such proceeding may be had thereupon as if no such writ of error had been brought into this House; and it is further ordered that the said plaintiff in error do pay, or cause to be paid, to the said defendants in error, the costs incurred in respect of the said writ of error, including the costs of the said petition of the defendants in error, which was argued by one Counsel of a side on the 1st day of July 1856; the amount of such costs to be certified by the Clérk of the Parliament." And on a subsequent occasion, after the costs were taxed, a further order or judgment was entered, in the following words:—"And it is further considered, by the same Court of Parliament, that the said Sir Thomas Barrett Leonard, Baronet, Nicholas Ellis, Henry Whiteside and Thomas Irwin, do recover against the said John M'Mahon £543. 1s. 4d., by the same Court of Parliament afore-said adjudged to the said Sir Thomas Barrett Leonard, Bart., Nicholas Ellis, Henry Whiteside and Robert Irwin, and with their assent, according to the form of the statute in such case made and provided, for their costs, charges and damages, which they have sustained, by reason of the delay of execution of the said judgment of reversal, on pretext of prosecuting the writ of error aforesaid; and also the proceedings aforesaid, had in the same Court of Parliament, in the premises, are remitted by the same Court of Parliament to the Exchequer Chamber of that part of the United Kingdom of Great Britain and Ireland called Ireland, to the end that execution may be had thereupon."

M. T. 1859.
Common Pleas.
M'MAHON
v.
LEONARD.

M. T. 1859.
Common Pleas.
M'MAHON
v.
LEONARD.

Mr. *Macdonogh*, for the plaintiff Mr. M'Mahon, has argued at considerable length, in the first instance, that the House of Lords had no power or authority to award those costs; that they not being in their nature interlocutory, neither the House of Lords nor any other Court have any authority to award such costs, except when authorised by Act of Parliament, and that none of the Acts giving costs apply to a case like the present, of a writ of error from an award of a *venire de novo*, and, therefore, that this Court should not have issued an execution founded on such a judgment; and he further argued that it was apparent, on the proceedings, that the House of Lords had made some mistake, and that they were under the impression that it was the plaintiff in the cause who had succeeded, and to whom they were awarding costs. It occurs to me that there can be no foundation for this latter suggestion. Though the language of the judgment is not very accurate, still it is impossible to doubt that what was intended was, that the plaintiff, Mr. M'Mahon, who failed in his writ of error, should pay the costs of the proceedings; and we find, among the proceedings in the House of Lords, that the question whether the costs should be awarded to the defendants was expressly brought under the consideration of a Committee of the House, to whom the matter was referred, and which Committee were of opinion that the costs should be awarded. And, with respect to the question whether the Committee and the House had authority to award these costs, as they have done, I can only say that, on a motion such as this, I disclaim all authority to inquire into the matter. The House of Lords being the Supreme Court of Appeal, we being the Inferior Court, it is not for us to inquire whether they were right or not in doing what they have done. Our only inquiry must be what they in fact did; and this inquiry we have no difficulty in answering, by saying that they clearly and distinctly adjudged that the defendants should recover, and the plaintiff pay, the sum in question, being the amount of the taxed costs of the proceedings in the House of Lords. Another question argued by plaintiff's Counsel was, whether these costs, even though ultimately payable by the plaintiff, could be recovered immediately, and whether the levying of them should not be stayed

until the final termination of the cause, and be included as a portion of the defendants' general costs of the cause, in case the defendants ultimately succeeded, or be set off against the plaintiff's costs, in case the plaintiff ultimately succeeded in the cause? and this, I confess, is the only part of this case on which I at any time entertained any doubt; and, if I may be allowed to express an opinion on the subject, I must say that, in my opinion, the House of Lords would have acted more in accordance with what has been considered the practice, if not the law, in such cases, if, though they had awarded the costs to the defendants, they had directed that the levying of them should be stayed until the final termination of the cause, so that there should be only one execution; still I am of opinion that, if there has been any miscarriage, the House of Lords, and not this Court, is the only tribunal to set it right; and that, as the House of Lords has ordered the amount to be paid, and transmitted the record to this Court, that execution should be had, and has not in any way suspended the issuing of that execution, that we have no power or authority to stay such execution. The only remaining objection made by plaintiff's Counsel was, that, even if these costs were immediately recoverable, they could be so recovered only by attachment, or some such proceeding, as on an interlocutory order, either in the House of Lords or in this Court, and not by execution out of this Court; more especially as the judgment or order of the House of Lords has not in any way made the order a judgment of this Court. The answer to this objection is, that the order in question, of the House of Lords, was a judgment, and not an interlocutory order; and the judgments of the House of Lords are always enforced by the execution of this Court, or such other of the Superior Courts here as the proceedings have been brought from and remitted to.

On the whole, therefore, I am of opinion that the present motion must be refused. I am also of opinion that, if the questions sought to be raised by the plaintiff's Counsel could be at all discussed, they could be so only in an action against the defendants, for the amount under the execution, in which action the defendants would justify under the judgment of the House of Lords. I am of opinion,

M. T. 1859.

Common Pleas.

M'MAHON

v.

LEONARD.

M. T. 1859. for the reasons I have stated, that such judgment would afford a
Common Pleas. sufficient justification; but, if any doubt was entertained on the
 M'MAHON subject, that doubt could be much more properly disposed of in
 v. such an action, in which the sufficiency of the justification could,
 LEONARD. if necessary, be brought to the House of Lords, the Court of Final
 Appeal. We must, therefore, refuse the present motion.

BALL, J.

I fully concur in the judgment delivered by the LORD CHIEF JUSTICE, and in the reasons stated by him as founding that judgment. He has delivered the judgment of the Court, and I do not think that anything is to be added to what he has so clearly stated.

KEOGH, J.

After the full and elaborate judgment pronounced by the LORD CHIEF JUSTICE, I feel that there is hardly anything which I can add. There is, however, one observation that I shall make, and it is this; that although it was stated by Mr. *Macdonogh* that there were three distinct objections to the execution of this Court, yet that, no matter how the argument was applied, they all amounted to this, that the present motion was an application to this Court, by way of appeal from the judgment of the House of Lords; although this distinction was taken, that this Court, although an Inferior Court, was at liberty to examine the decision of the House of Lords, for the purpose of ascertaining whether or not there was *error in fact* in that decision; and that if it appeared that their judgment was founded upon an error in fact, we should not carry it into effect. I confess I am at a loss to understand what is the meaning of saying that we are to look into this judgment, to see if there be *error in fact*. What may this *error in fact* be? Mr. *Macdonogh* says, that the judgment of the Lords itself shows us what it is, viz., by awarding costs and damages to the defendants in error, directing that such costs and damages were to be levied by execution; and declaring that such award and direction were made according to the provisions of the statute in such case made and provided; whereas Mr. *Macdonogh* contends that the statute referred to does not apply to this

particular case: and thus it is, as he alleges, that the judgment of the Lords indicates what the error in fact is. But it occurs to me, is not this a question of law, founded upon a consideration of the provisions of this statute? and if we are to entertain this question, must we not decide that the House of Lords could not have based their judgment upon anything else besides this Act of Parliament? We cannot, in my opinion, look into this judgment of the House of Lords, for the purpose of seeing whether or not there be *error in fact* in that judgment, without involving ourselves in the other question, viz., whether or not it is founded upon *error of law*; and, therefore, we cannot review this judgment, either upon a question of *error in fact* or *error in law*.

M. T. 1859.
Common Pleas.
 M'MAHON
 v.
 LEONARD.

We must, therefore, go back to the original proposition, that this Court is not at liberty to review a judgment of the House of Lords. If this be so as to the first proposition contended for by Mr. *Macdonogh*, and if it is admitted that the order of the Lords cannot be impeached, it is in the next place contended that, the Lords having awarded these costs, and having directed that execution should be had upon their order, this Court shall see that the execution should not be *improvidently* had thereon; and that we must consider what the proper practice is, and that, although these costs have been taxed and certified, and the proceedings remitted to this Court, in order that the amount should be levied, that we are nevertheless to interpose, and say that the House of Lords intended that execution was not to be immediate, but that the amount was to be levied at some future day. But it appears to me that this is precisely coming back to the former question; for it amounts to this, that this Court is to be at liberty to alter, and interpolate something of its own into, the judgment of the House of Lords.

We now have to consider whether this is the ordinary case of a judgment of the House of Lords awarding costs. We have all the proceedings before us, and we find that a petition has been presented by Mr. M'Mahon (which I am at liberty to refer to, as it appears upon the files of the Court), by which, after the House of Lords had pronounced their judgment awarding these costs,

M. T. 1859.
Common Pleas.
 M'MAHON
 v.
 LEONARD.

reasons and arguments of the most comprehensive character are presented, to induce them not merely to stay execution for these costs, but impeaching their jurisdiction to make this award, and praying that, inasmuch as they had no power to award these costs, their judgment so far should be reversed. It appears that this petition was fully considered; and we find upon the record a specific declaration that the House of Lords adhere to their former judgment, declining to yield to the prayer of the petition, although their attention was specifically drawn to this question of costs; and are we to be asked, upon such a state of facts, to review this decision of the House of Lords, so pronounced and so re-considered, as to the very question now in debate? After the very able judgment of the LORD CHIEF JUSTICE, it would be an idle discussion for me to enter into these questions, but for some doubts expressed by him as to the last question; i. e., assuming that the jurisdiction of the House of Lords is conceded, and that they have adopted the proper course, and that execution should issue for these costs, it is nevertheless contended, that there remains something to be done by this Court, in the nature of a rule, or an *ideo consideratum est*, or something of that kind, in order to give validity to the judgment of the Court of Ultimate Appeal, which has been remitted to us. I need only express my opinion that the judgment of the Lords appears to be fully and sufficiently upon the roll, and that we have done, and properly done, all that the order of the House of Lords directed that we should do.

Now, as to the common sense of the thing itself, why should not this execution issue? The more it is contended that the House of Lords had no jurisdiction to make this order, upon a writ of error from a *venire de novo*, and the stronger the arguments used against this award, the stronger is the reason, now that this order has been made by them, in the teeth of such arguments, why that execution should issue, and at once.

We cannot review the decision of that Court, we can only carry its orders into effect. That order in the present case is clear and precise, that execution should issue; and that execution has issued, according to the practice and rules of this Court.

CHRISTIAN, J.

I should, for my part, have been perfectly satisfied to do in this case as we are enabled to do in most of the cases which are discussed in this Court, namely, to rest my concurrence in the judgment of the Court upon the reasons which have been so fully and clearly stated by my LORD CHIEF JUSTICE. My Brother BALL is quite correct in stating, that it was understood amongst us that this case should be dealt with in that way; and I should have followed his example, if my LORD CHIEF JUSTICE had not in his judgment invited an expression of their reasons on the part of the other Members of the Court. To that invitation I shall not decline to respond, although being conscious that in this, as in all other cases in which my LORD CHIEF JUSTICE delivers the judgment of the Court (which he never does without previously collecting the reasons, as well as the opinions, of its other Members), little beyond mere repetition is left for those who would follow him.

The part of the case upon which alone any doubt existed in my mind was, upon the *construction* of the judgment of the House of Lords, of 16th of July 1858; *i. e.*, whether the words which occur at the close of it, "that the record and proceedings had in "the Court of Parliament be remitted, &c., to the end that execution may be had thereupon," should be held to mean (as naturally they would) execution *immediate*, or should be understood as embodying a reference to the old principle of *unica taxatio*, and, therefore, as importing execution to be done after final judgment?

With respect to the other propositions which were propounded on behalf of the plaintiff, I must say that I have not felt any serious difficulty. As to the first of them, namely, that we are to set aside the execution, on the ground that the judgment on which it issued was void, for want of jurisdiction in the House of Lords, the only doubt which ever crossed my mind was, whether we ought to have allowed that proposition to be argued. I care not whether the error which is imputed to the House of Lords be an error in law or an error in fact (though it is perfectly clear that it was, if error at all, error at law, and not of fact, for the

M. T. 1859:
Common Pleas.

M'MAHON
v.
LEONARD.

M. T. 1859.
Common Pleas.

M'MAHON
v.

LEONARD.

judgment shows on the face of it that the Lords were in no error as to the nature of the judgment which in fact was pronounced below, but erred, if at all, in supposing that to be a judgment within the operation of the statute *Hen. 7*—clearly an error in law—but be it law or be it fact), that judgment having been pronounced by the House of Lords, in a matter within the general jurisdiction of that High Court, *i. e.*, a question of the costs of parties in due form of law litigant before it, I, for one, am of opinion, that the question whether we, sitting here *in the later stages of the very same cause* in which that judgment was pronounced, and placed on our records, are bound by that judgment, or are at liberty to treat it as a nullity, is one which, in my opinion, lies altogether outside the boundary of all legitimate argument.

Assuming, then, that the judgment of the House of Lords is valid, it was next insisted that it was not one which could be executed by the process of this Court, but that execution should be had either from the House of Lords itself, or, at all events, not here, until after that judgment had been followed up by the judicial action in some way of this Court itself. But it appears to me that that proposition is wholly inconsistent with the true function and province of a Court of Error. What a Court of Error does, on error duly brought, may be thus described: It takes possession of the roll from the Court below; it places upon that roll, as its own judgment, that which is the true judgment of the law, under the circumstances, and then returns the roll to the Court below, with this new judgment placed upon it. This is literally what is done in the Exchequer Chamber, under the Common Law Procedure Act (1853), s. 175; and although on error to the House of Lords a transcript, and not the original roll, is what is forwarded, yet the effect is substantially the same—the judgment of the Lords is placed on the transcript, and that is remitted here, in order that it may be copied on the roll, as the judgment of the House of Lords. Then out of what Court is the execution to issue? Not out of the Court of Error, which no longer has possession of the record, and is without officers and machinery for such a purpose. Clearly, then, out of the Superior Court. How, then, out of that Court?

Must there be the preliminary of a repetition upon the roll, as the act of the Inferior Court, of that judgment, which is already there as the act of a Court of competent and superior authority? That would be, in my mind, highly untechnical, if not presumptuous. The process of the Common Pleas is applicable to the enforcement of a judgment placed upon its roll by authority of a Court of Error, just in the same way, and just as much as of course, as it is in the case of a judgment placed there by authority of the Common Pleas itself. The practice in this respect, as stated to us by the Masters of both Courts, the Queen's Bench and Common Pleas, is, in my opinion, in exact conformity with principle.

But there still remains open the question which, I think, is the serious one in the case, viz., the construction and effect of the judgment. There is nothing on the face of it which imports a stay of execution; but it was strongly argued that it must be read as embodying an implied reference to the well-known principle in the constitution of a suit at law, which forbids execution on an interlocutory judgment, and requires that there shall be one judgment, one taxation, one execution at the end of the cause. Now the first observation which occurs on that argument is, that it might have been addressed to the House of Lords for the purpose of inducing them to introduce an express clause to that effect. But as that was not done, are we at liberty to introduce one by implication? It is true that this judgment is in one sense an interlocutory judgment, having been pronounced in the middle of the cause, but, in another sense, it is a final judgment, inasmuch as the amount of the costs is ascertained, adjudged, and directed to be levied by execution, and inasmuch as (as was admitted) no after result of the cause could derogate from or alter that right. The truth is, the whole of this proceeding on writ of error to the House of Lords, on a judgment merely awarding a *venire de novo*, and a judgment of that House thereon, awarding costs, is novel, if not anomalous; and the only reported case in which it appears to have previously occurred is that of *Harrison v. Stickney* (a). The form of the entry of the judgment in the present case is peculiar. There is, first, an adjudi-

M. T. 1859.
Common Pleas.

M'MAHON
v.
LEONARD.

(a) 2 H. of Lords, 108, 130.

M. T. 1859.
Common Pleas.

M'MAHON

v.

LEONARD.

cation that the judgment of the Exchequer Chamber be affirmed, and that "the record be remitted, to the end that such proceedings " may be had thereon as if no such writ of error had been brought " into the House." After that, follows the direction that "the " plaintiff in error pay to the defendant in error the costs incurred " in respect of said writ of error, the amount of such costs to be " certified by the Clerk of the Parliament." Now, so far, there is a complete entry of a judgment, but of one which, as to the costs, was plainly only interlocutory, because the amount was as yet unascertained; and, therefore, there is no direction for execution, nor any *remittitur* of the record following the award of costs. But the costs having been certified by the Clerk of Parliament, the entry is then resumed, the judgment of the House is repeated, with this difference as to the costs, that it is now for the payment, by the plaintiff to the defendant, of an ascertained sum; and *then* immediately follows a new clause of *remittitur*, viz., that the record be remitted, &c., "to the end that execution may be had thereupon." Now this appears to present all the characteristics of a judgment final as to these costs, and to be quite different from the form of an ordinary interlocutory judgment, carrying costs which are unascertained by that judgment, and must remain so till after final judgment. To insert in the judgment, by implication, such a provision as is contended for would be, in my opinion, not merely to add to, but to contradict, its terms. The truth is, that all the plaintiff's arguments (whatever be their value otherwise) come too late when urged upon this motion. The House of Lords is the tribunal to which they should have been addressed. They might have been, and, for aught I know, were urged by the defendant in support of his petition, against the House entertaining the writ of error at all. They were, as we know, urged upon the House by the plaintiff himself, in support of his petition, which my Brother KROGH has adverted to, in which he sought to have the award of costs expunged from the judgment, and he might have then asked, and, for all I know, did so, for, at all events, a stay of execution until after final judgment. But after having failed at those stages—after the Lords have overcome the difficulty of en-

tertaining the writ of error at all, and of awarding costs upon it at all, it is, in my opinion, quite too late now to ask us, upon those grounds, to interfere with an execution which is simply consequential upon the judgment as it stands. I find nothing in the language or nature of the judgment, or in the justice or reason of the case, which would warrant us in interpolating a clause which not only the terms of the judgment do not import, but which they contradict.

I, therefore, concur in the judgment of the Court.

No rule.

M. T. 1859.
Common Pleas.

M'MAHON
v.
LEONARD.

MASSY v. TRAVERS and others.

T. T. 1860.
June 6.

THIS was an action of ejectment upon the title, brought to recover possession of the lands of Ballinamony, otherwise Moorestown, Ballymackredmond, Ballinbroky otherwise Ballibroky, and other denominations, situate in the barony of Ibane and Barryroe, in the county of Cork. This case was tried before Mr. Baron Hughes, at the last Assizes for the county of Cork.

The plaintiff's case was as follows:—That by deed of settlement, bearing date the 25th of March 1780, and made between John Moore Travers, of the first part, Mary Orpen, widow, of the second part, Mary Orpen, spinster (her daughter), of the third part, Robert Waller and Edward Wilmot, of the fourth part, and Sir

In a marriage settlement, the ultimate remainder to the settlor in fee-simple does not come within the consideration of the marriage, or any other consideration moving from the wife, and amounts simply to a declaration of the continuance of his old estate in the settlor.

A B, being seized in fee, by deed of settlement upon his first marriage in 1766, conveyed his estate to the use of himself for life, remainder to the issue of the marriage in tail male, remainder to C D, his brother, for life, remainder to the issue of C D, in tail male. In 1780, upon his second marriage, A B conveyed the same estates to the use of himself for life, remainder to such sons of the marriage as he should appoint, and in default thereof to the issue of the marriage in tail male, "and in default of such issue to the use and behoof of the said (A B) and his right heirs for ever." A B had no issue of the first marriage, and one daughter, M N, of the second, to whom he devised the settled property.—*Held*, that the conveyance in the first settlement to C D, although voluntary, prevailed against the devise to M N.

T. T. 1860. *Common Pleas.*

MASSEY
v.
TRAVERS.

J. C. Colthurst and J. H. Orpen, of the fifth part, being made in contemplation of the marriage of John M. Travers and Mary Orpen the younger, after reciting an agreement to grant and convey (amongst others) the lands and premises the subject-matter of the present action, to and for the several uses, and upon the trusts and subjects to the limitations, powers, provisions and conditions thereafter expressed, of and concerning the same, in pursuance of the said agreement on the part of the said J. M. Travers, and in consideration of the marriage and the conveyance made by Mary Orpen the elder, said J. M. Travers conveyed the said lands to the uses following: after the solemnisation of the said marriage, to the use of the said J. M. Travers and his assigns, during the term of his natural life, and, from and after the death of the said J. M. Travers, to the use that the said Mary Orpen, his intended wife, in case she should survive him, should receive thereout a jointure of £170, with the usual powers of entry and distress; and from and immediately after the decease of the said J. M. Travers, to the use of the said Sir J. C. Colthurst and J. H. Orpen, for the term of 300 years, and, subject thereto, as to said jointure, to the use of such son of the body of said J. M. Travers, on the body of the said Mary Orpen the younger to be begotten, and the heirs male of the body of such son, as the said J. M. Travers should, by his last will and testament in writing, or by any deed under his hand and seal, limit and appoint; and in default of such limitation or appointment, then, from and after the decease of the said J. M. Travers, chargeable with said jointure, and, subject to said term of 300 years, to the use of the first and other sons of the said J. M. Travers, on the body of the said Mary Orpen to be begotten, and the several and respective heirs male of the several and respective bodies of such sons, one after another; and in default of such issue, then, subject to and charged as aforesaid, to the use of the said J. M. Travers, and his right heirs for ever.

The following pedigree was stated and admitted at the trial:—That there was issue of the said marriage one child, a daughter, named Mary Anne Travers; that the father, J. M. Travers, died in the year 1785; that Mary Anne Travers was married, in the year 1799,

to John Massy of Glenville, in the county of Limerick, and that the plaintiff was the eldest son of that marriage; that John Massy, the plaintiff's father, died in the year 1846, and that his mother died in the year 1856; that John M. Travers had a brother, Robert Travers, who had an only son, J. M. Travers (the younger), under whom the defendant claimed, in right of Lady Clarke Travers, the only child of J. M. Travers (the younger). The plaintiff also produced the original will of J. M. Travers (the elder), dated the 10th of September 1783, whereby he devised the said lands to Mary Anne Travers, in these terms:—"I will and bequeath to my only daughter, Mary Anne Travers, all my lands and estate in the barony of Ibane and Barryroe, on her attaining to the age of twenty-one years, or day of marriage; provided that such marriage is with the consent of her mother and guardians, but not otherwise: and it is also my will and intent that my said daughter, Mary Anne Travers, may give and dispose of said lands and estate to and amongst her child or children, at such time, and in such manner, and in such proportions, as she, by any deed executed in her lifetime, or by her last will and testament, shall direct or appoint; but if she should die, and neglect disposing of said lands and estate among her children, by deed or will, then and in that case, my will is, and I direct, that my said lands and estate should go to her eldest son, on his attaining the age of twenty-one years, and to every other son according to priority of birth; and if no son or sons of her should be living at the time of her death, then my will is, and I bequeath the said lands and estate to her daughter and daughters, share and share alike; and if my said daughter, Mary Anne Travers, should die leaving no issue, then and in that case my will is, that she shall have full power to will and bequeath my said lands and estate to her husband, during his natural life."

T. T. 1860.

Common Pleas.

MASSY

v.

TRAVERS.

Upon the death of J. M. Travers (the elder), in 1785, his brother, Robert Travers, had entered into possession of the lands, and possession of them had been retained by him and his son, J. M. Travers (the younger), and the other defendants in this action.

The defendants relied upon the Statute of Limitations, and also pro-

T. T. 1860. *Common Pleas.*
 MASSEY
 v.
TRAVERS. duced a deed of settlement, bearing date the 13th of December 1766, and made upon the intermarriage of J. M. Travers (the elder) with his first wife, Alice Byrne, whereby the said J. M. Travers conveyed the said lands to the use of himself for life, remainder to the first and other sons of said marriage in tail, and, in default of issue male of said marriage, remainder to his brother, the said Robert Travers, for life, remainder to his first and other sons in tail. A deed was also proved, executed in the year 1811, by J. M. Travers (the younger), the eldest son of Robert Travers, for the purpose of making a tenant to the *præcipe*, and suffering a recovery of said lands; and a recovery subsequently suffered by him was also proved.

Counsel on behalf of the plaintiff submitted that the limitations to Robert, brother of J. M. Travers (the elder), and to his issue, as contained in the settlement of 1766, were voluntary, and void against the parties claiming under the settlement of 1780, including J. M. Travers (the elder) the settlor.

For the defendants it was urged that, under the settlement of 1780, the ultimate remainder in fee to J. M. Travers the settlor was either voluntary, or that he was in simply of his old estate and that, therefore, the prior settlement should prevail.

The learned Judge directed a verdict for the defendants, reserving leave for the plaintiff to apply to the Court that the verdict for the defendants should be turned into a verdict for the plaintiff, if the Court should be of opinion that, on the facts and documents, the plaintiff was so entitled.—[The facts will appear more fully stated in the judgment of the Court.]

A conditional order, pursuant to leave so reserved, having been obtained—

J. Clarke (with whom was *Brewster*) showed cause.

The limitation to the settlor's brother, although void as against purchasers for valuable consideration, is valid as against the settlor himself. The ultimate limitation, in the second deed of settlement, to the settlor, merely operated as a declaration of the continuance

of his original estate, which remained after the termination of the particular estates the subject of that settlement.

T. T. 1860.
Common Pleas

MASSEY
v.
TRAVERS.

Sullivan and C. Barry, contra.

If the settlor sell his ultimate remainder, a claimant under a voluntary settlement has no title to the purchase-money: *Daking v. Whimper* (a). Therefore a volunteer cannot claim the estate itself. But every estate in a marriage settlement, whether to the husband, wife or issue, is for value, inasmuch as the wife abandons her dower: *Blake v. French* (b). She purchases for the husband as well as for herself: *Nairn v. Prowse* (c). If the fee-simple were conveyed to the wife, it would, no doubt, be a conveyance for valuable consideration; it is the same thing if she permits the conveyance to be made to the husband. This is, therefore, a stronger case than *Scott v. Bell* (d), cited in *French v. Blake*; for here the husband's estate is for valuable consideration: *Heap v. Tonge* (e); *Atkinson v. Smith* (f).—[CHRISTIAN, J., refers to *Roe d. Hamerton v. Mitton* (g).]—Miss Orpen bargains for a fee-simple estate in her husband.—[CHRISTIAN, J. Suppose there had been no ultimate limitation to the husband, and that the use in fee had resulted, would that have been for valuable consideration?—In that case there is no contract for the resulting use; but, in this case, the consideration affects every estate in the settlement: *Jenkins v. Keymis* (h). *Barham v. The Earl of Clarendon* (i) will be relied on by the other side; but it is distinguishable, the sole object of the settlement in that case being a provision for the wife.

Brewster, in reply.

The question is, how far does the consideration of the marriage extend? It can only affect the estate of the wife, if any, and of her

(a) 26 Beav. 568.

(b) 5 Ir. Chan. Rep. 246.

(c) 6 Ves. jun. 752.

(d) 2 Lev. 70.

(e) 9 Hare, 90.

(f) 3 De Gex & J. 186.

(g) 2 Wils. 358.

(h) 1 Lev. 150, 237.

(i) 10 Hare, 126.

T. T. 1860. children, not the estate which the husband originally had, and which
Common Pleas. remained in *statu quo*.
 MASSY
 v.
 TRAVERS.

Cur. ad. vult.

CHRISTIAN, J., delivered the judgment of the Court.

June 11. This was an ejectment upon the title, brought for recovery of certain lands in the county of Cork. It was tried at the last Assizes for that county, when a verdict was had for the defendant. A conditional order was since made to set aside the verdict; and the question now is, whether that order shall be made absolute? The title was as follows:—John Moore Travers (under whom both parties derive) was seised in fee of the lands in dispute; and by indenture, bearing date the 13th of December 1766, being the settlement executed upon his first marriage, he conveyed them to the use of himself for life, remainder to the first and other sons of that marriage in tail male, remainder to his brother Robert Travers, for life, remainder to his (Robert's) first and other sons in tail male. These latter limitations to Robert Travers and his sons being outside the marriage consideration, and there not having been any other consideration to support them, the settlement was, as regarded them, purely voluntary.

There was no issue of that marriage, and the wife died, leaving the husband surviving. The estate then stood settled to the use of John M. Travers for life, remainder to Robert, his brother, for life, remainder to Robert's first and other sons in tail male, reversion to J. M. Travers in fee. This settlement had, however, in the foregoing events, become wholly voluntary.

In 1780, J. M. Travers married a second time. Upon that occasion, a settlement was executed, bearing date the 29th of March 1780. No notice was taken in it of the previous settlement of 1766: on the contrary, it contained an express recital that J. M. Travers was then seised in fee; and, by this settlement, in consideration of the then intended marriage, and of a settlement made by the same deed, by the lady's mother, of certain lands of her own, J. M. Travers conveyed the lands in question to trustees, to the use of himself for life, remainder subject to a jointure of £170 a-year for the lady,

to other trustees, for a term of 300 years, remainder to the use of such son of that marriage as J. M. Travers should appoint, in tail male, and, in default of such appointment, to the first and other sons of that marriage, successively in tail male; "*and for default of such issue, then (so subject and charged as aforesaid) to the use and behoof of the said John Moore Travers and his right heirs for ever.*" The trusts of the term of 300 years were declared to be, to secure this jointure, and to raise £800 for the younger sons and daughters of the marriage. The lady's mother then conveys her estate to trustees for a term of 500 years, upon trust, in the first place, to pay certain annuities to the husband and wife, and in the next place, after their deaths, to raise a further portion of £1200 for the younger sons and daughters.

Of this marriage, the only issue was a daughter named Mary Anne. It will be seen, by reference to the limitations of the settlement of 1780, that she took under it no estate in the lands, but was entitled of course to the whole of the portion of £2000 provided for the younger children. John Moore Travers died in 1785; and, thereupon, his brother Robert went into possession of the estate, claiming under the settlement of 1766. He was succeeded by his son, John Moore Travers the second, as first tenant in tail under that settlement. J. M. Travers the second suffered a recovery, and the defendants in this ejectment derive title under him, and have been in possession to the present time. However, it appears that John Moore Travers the first, before his death, made a will bearing date 10th of September 1783, by which he devised all his estates to his daughter Mary Anne and her children, in such language as, according to the plaintiff's contention, and which may be conceded for the sake of argument, would make her tenant for life of whatever estate would pass under the will, with remainder to her eldest son in fee. She married, in 1799, a gentleman named John Massy, and the plaintiff in this ejectment is her eldest son; she died in 1856: and the plaintiff has brought this ejectment, insisting that, as devisee of John Moore Travers the first, he is entitled to this estate by a title which first accrued to him in possession in 1856.

Now, unquestionably, at first view, as must strike every mind,

T. T. 1860.
Common Pleas.

MASSY
v.

TRAVERS.

the plaintiff has undertaken one of the most up-hill cases that ever was assumed by a suitor in a Court of Justice: for what he affirms is this; that claiming, as he does, merely as a devisee, he has a better title than those who are in possession under a conveyance by deed from his devisor—a conveyance founded on perfectly good, though not valuable, consideration. However, the case has been argued by very eminent Counsel, with very great confidence; it is one of great importance to the parties, and a considerable property is at stake; and we ought not, therefore, to content ourselves, as we otherwise might, with answering the argument merely by enunciating the proposition to which it leads.

What was argued was this; that the ultimate limitation in the settlement of 1780, to J. M. Travers and his right heirs, was, like all the other limitations, purchased for valuable consideration, and that, as the limitations in the settlement of 1766, under which the defendants derive, were admittedly voluntary, they were, by virtue of the statute 10 *Car.* 1, s. 2, c. 2, fraudulent and void as against J. M. Travers himself, and against the plaintiff as his devisee. The consideration alleged was twofold; first, it was said that the consideration of the marriage necessarily extended to every estate which he, the intended husband, took under the settlement; secondly, that the lady's mother must be considered as having expressly stipulated for this limitation, as part of the consideration for the settlement of her own estate.

Now before we involve ourselves in nice legal discussions, it is better to see what we have to go upon. What is the operation of the settlement of 1780 *per se*? That is the first point. To constitute a purchase for valuable consideration, three things are requisite; first, that there shall be something acquired by purchase; secondly, that there shall be a valuable consideration; thirdly, that these two shall be connected by contract or bargain, express or implied.

The first and third of these requisites are, in my opinion, wholly wanting in the present case. There is no subject-matter of purchase at all, for the simple reason that (except a life estate) J. M. Travers or his heirs took nothing whatever under the settlement of 1780. The settlement operates precisely as it would have done if it had

stopped short at the limitation to the first and other sons in tail. In the one case as well as the other, J. M. Travers simply remained in of his former estate. This rests on a familiar principle in conveyancing, which, though spoken of with some scorn by the Counsel for the plaintiff, is, nevertheless, so well known and established, that it would be mere pedantry to do more than advert to it. A settlor cannot make his own heirs or devisees purchasers under the settlement.

T. T. 1860.
Common Pleas.

MASSY
v.
TRAVERS.

In *Roberts on Fraudulent Conveyances* (s. 8, p. 175), a textbook of a very superior class, this principle is applied to the very point in question, in language which, in my opinion, correctly states the law:—"If we consider the case of a settlement by the owner of "a real estate, upon his marriage, whereby the strict uses are limited to the husband, wife and issue, with an ultimate limitation to the right heirs of the grantor, there seems hardly a necessity for argument to show that a person claiming this ultimate estate, as right heir of the grantor, takes nothing which can be the subject of dispute upon the statute 27 *Eliz.*, c. 4. It is a positive rule of law, that no man can raise a fee-simple to his own right heirs, by the names of heirs, as *purchasers*, either by conveyance of the land, or by use, or by devise: *Hob.* p. 30. Notwithstanding such conveyance, limitation or devise, the heir will still take by descent, and will, in consequence, be quite out of the reason and contemplation of the statute of *Elizabeth*. Nor is it of importance, as to this point, whether the grantor limits an use to himself for life, or not: whenever a man is seised of the whole legal and beneficial estate, and makes a conveyance for particular estates, uses or trusts, whatever he does not part with remains in him; and if he limits *by expression* a remainder to his right heirs, such limitation takes no effect, but the reversion abides with the grantor, and the express estate is supplied by one the same in quantity, though differing in quality."

It was suggested, however, that the limitation in question here may operate by way of purchase, because the estate which it purports to give is different from that which J. M. Travers then had under the settlement of 1766. But it is manifest that the

T. T. 1860. *Common Pleas.* same observation would apply to the passage I have just read; for it is there necessarily assumed that some previous disposition existed, inconsistent with the limitation to the right heirs of the grantor, otherwise the question which Mr. *Roberts* was discussing could not arise at all. The truth is that, in order to judge of the effect of the settlement of 1780 *per se*, as regards the limitation in question, it is necessary to assume that J. M. Travers was then seised in fee; first, because that is an essential term in every case founded on the Statute of Fraudulent Conveyances, inasmuch as the theory on which the argument proceeds is that the previous disposition is void by the statute; secondly, because in this case the settlement contains an express recital that J. M. Travers was seised in fee. Then the result is, that this principle or positive rule of law, as Mr. *Roberts* calls it, shows that what is called a limitation and purchase here is in truth a mere nullity. The estate remains precisely as if it had not been inserted. There is no acquisition of anything by J. M. Travers or his heirs; so *cadit questio*.

But suppose this first difficulty could be overcome, and that this could be considered as an acquisition of an estate, by force of the settlement, it remains to show that it was procured for a valuable consideration. No doubt there was, in this settlement, valuable consideration, viz., the consideration of marriage, and the consideration of mutual settlement. But, in order to constitute a purchase for value, the consideration and the limitation in question must be connected by the bond of contract, express or implied; the consideration must be the motive which draws out the estate from the grantor. Much stress was laid upon the fact that the lady's mother was a party to the settlement, and charged her own estate; and it was said that *she* purchased, for the benefit of her daughter and her issue, this limitation to the husband and his heirs. Now it does not appear to me that the concurrence of the mother makes any difference whatever in the case; for whatever the mother could stipulate for, by the consideration of her own estate, for the wife or the issue, the wife herself could equally well stipulate for by the mere consideration of the marriage. The cases in which

the intervention of third persons is important are those in which limitations are introduced in favour of entire strangers to the marriage consideration. Then, if there be some third person a party, from whom some consideration moves, and who may be supposed to be interested for those strangers, it will be taken that he has stipulated for those limitations for them, as the equivalent for giving his concurrence to the settlement, or whatever else may be the consideration which moves from him. That is the principle of *Roe v. Mitton* (a); *Pulvertoft v. Pulvertoft* (b); *Heap v. Tonge* (c). But the parties to the marriage contract themselves need no assistance from third persons. They can contract on their own behalf, and the consideration of the marriage is alone sufficient to validate everything *which they contract for*. The argument would therefore be precisely the same if the mother and her estate were out of the case altogether. But what is it that the wife or her friends are supposed to stipulate for in a marriage treaty, as regards the husband's estate? For the provisions which move from him for the wife and children. So also they may be supposed to stipulate for any provisions which move *to the husband from a third person*. But do they stipulate for an estate to move from the husband to himself? are they the purchasers of that? *Barham v. Earl of Clarendon* (d) is in point here. In that case, a person seised in fee of an estate, subject to certain charges, covenanted in his marriage settlement to pay off those charges and to settle the estate, discharged of them, to the use of himself for life, remainder (as I collect) to the issue of the marriage, remainder to himself in fee. Of course all who were purchasers, within the consideration of that settlement, had a right to have the covenant for exoneration performed by John Barham, or, after his death, out of his personal assets. There were no issue of the marriage. John Barham died, leaving his brother his heir-at-law, who became entitled to the estate; and a bill was filed by the devisee of that heir-at-law, to compel an exoneration out of the personal estate of John Barham:

T. T. 1860.
Common Pleas.
 MASSY
 v.
 TRAVERS.

(a) 2 Wils. 356.

(b) 18 Ves. 99.

(c) 9 Hare, 90.

(d) 10 Hare, 126.

T. T. 1860. *Common Pleas.* One of the grounds relied on was that the ultimate limitation to John Barham himself, in fee, was within the consideration of the settlement, and that, consequently, the plaintiff was in the position of a purchaser for valuable consideration—the identical point contended for in this case. The Vice-Chancellor said:—"I think that the plaintiff's claim to be considered as a purchaser under the settlement cannot be maintained. I do not think it could have been maintained, if the ultimate limitation had been to the heirs of the husband; for the wife could hardly be considered to stipulate for the husband's heirs; but here the ultimate limitation is to the husband himself in fee; and surely the wife cannot be considered to stipulate for him. I am of opinion, therefore, that the case must be determined without reference to any claim of the plaintiff as purchaser." Now that is perfectly precise upon this, that even if Mr. *Roberts* were wrong in the proposition that an ultimate limitation to the grantor and his heirs is a mere nullity, which is his reason for holding that it is no subject-matter for the Statute of Fraudulent Conveyances, at all events it has not the quality of a purchase for value, because the wife cannot be supposed to stipulate for an interest to the husband from himself. There is no pretence for saying that there is anything on the face of the settlement to show that the parties did actually intend to contract for this particular limitation; and it would be an extraordinary perversion of our notions of contract or bargain, to say that the wife or her mother contracted with the husband for a settlement of his own estate upon himself in fee. Thus another element, essential to the plaintiff's case, is wanting; and to sum up, in a sentence, what I have been trying to express, I am of opinion that the ultimate limitation in the settlement of 1780 does not constitute a purchase for valuable consideration, for two reasons; first, because it is inoperative to create any estate at all; secondly, because, even if an estate passed under it, that estate would not be clothed with a valuable consideration, inasmuch as it could not be considered as a part of what was stipulated for in the treaty for the marriage.

I should not omit to mention the case which was chiefly relied on for the plaintiff, namely, *Nairn v. Prowse* (a). A very brief

(a) 6 Ves. 752.

statement of it will show its inapplicability. A person who stood *in loco parentis* towards the intended husband executed two bonds to trustees, on occasion of the marriage, one to secure a sum of money for the benefit, in the usual order, of husband, wife and children; the other to secure an annuity by way of present advancement to the husband. The obligor was much indebted at the time; and, after her death, in a suit for administration of his assets, the question arose whether these bonds should take rank as debts for value, with his other debts? So far as the wife and children were concerned, it was admitted they should; but as regards the interests given to the husband, it was contended that they were voluntary, and void as against creditors, under the statute 13 *Eliz.* Sir W. Grant denied the existence of any such distinction, and held that these benefits, moving from a third person to the husband by way of advancement on his marriage, and as a part of the marriage arrangements, were within its consideration. But the way to test the application of that case to the present is to suppose that the husband himself was the obligor in the bonds, and that, after certain limitations in favour of the wife and children, there were an ultimate limitation, in default of issue, to the husband himself, his executors and administrators. If the wife died without issue, could the husband, or his legatee, claim the amount of this bond as against his own creditors?

It would be superfluous to pursue the case further. I have dwelt upon it at a length rather proportioned to its importance to the parties than to any difficulty which it presents. We are all of opinion that the verdict was properly entered for the defendant, and that the cause shown against the conditional order to set it aside should be allowed with costs.

Cause allowed.

T. T. 1860.
Common Pleas.

MASSY
v.
TRAVERS.

M. T. 1859.

Eschequer.

GOGGINS v. TRENCH.*

Nov. 15, 18.

E. T. 1860.

April 19.

(Eschequer.)

To an action of replevin, the defendant pleaded, by way of avowry, the grant of a rentcharge to her, the defendant, and justified the taking, as a distress for the arrears; but the plea did not aver a compliance with the requirements of the 9 & 10 Vic., c. 111.—*Held* (FITZGERALD, B., *dissentiente*), that the plea was bad.

By deed, executed upon the marriage of J. T. with M., J. T., in consideration of the marriage, and by virtue of a bargain and sale (no lease for a year being recited), bargained and sold, &c., certain lands to trustees, and the survivor and the heirs of the survivor; *habendum* for 500 years, for the use of J. T. for his life, remainder over; and further, to permit M., in case she survived J. T., to take a jointure of £50; and, in case same should be in arrear, that it should be lawful for the trustees or the said M., the defendant, to distrain for the payment thereof.—*Held*, that the deed granted a legal rentcharge to M.

The plea averred that J. T. was, at the time of the execution of the deed, &c., "seised" of the lands in question, and, being so "seised," by indenture, &c., granted the lands, &c.—*Held*, that the averment of the estate of J. T. was sufficient on general demurrer.

REPLEVIN.—The summons and plaint complained of a taking of the goods of the plaintiff, on the lands of Carran in the county of Mayo. Plea, by way of avowry:—"That one John Trench was, at the time of the execution of the deed hereinafter mentioned, seised of the said lands in plaint mentioned, to wit, the lands of Carran, of which Drumroe, Cloonskeagh and Magherabane are sub-denominations; and, being so seised, by a certain indenture, bearing date the 28th day of January 1804, executed in contemplation of the marriage of the said John Trench with defendant Mary Trench otherwise Hutcheson, and made between Hubert Hutcheson, of the first part, the said defendant Mary Hutcheson, now Mary Trench, of the second part, John Trench, of the third part, Thomas Bomins, of the fourth part, and David Hutcheson, of the fifth part, and duly sealed by the said John Trench, he the said John Trench, for the considerations therein mentioned, did grant, bargain, sell, assign, transfer and make over, unto the said Thomas Bomins and David Hutcheson, and the survivor of them, and to the heirs of such survivor, among others, the said lands of Carran, Drumroe, Cloonskeagh and Magherabane, to hold to them for and during the term of 500 years, in trust, however, to permit, and suffer the said defendant, Mary Hutcheson otherwise Trench, in case she should survive the said John Trench, to take and

* Before PIGOT, C. B., and FITZGERALD and HUGHES, BB.

"receive, yearly and every year, during her natural life, the sum of M. T. 1859.
 "£50 sterling, half-yearly, the first half-yearly payment to com- Eschequer.
 "mence to accrue from the death of the said John Trench, and to GOGGINS
 "be payable in six months after his decease, and so on from time to v.
 "time, at the end of every successive half year, during the life of TRENCH.
 "said Mary Trench otherwise Hutcheson; said yearly sum to be
 "issuing and payable, and to be charged upon, and received and
 "taken from and out of said lands, in said plaint specified. And
 "the said John Trench did covenant that, in case the said jointure
 "or yearly sum of £50, or any part thereof, should happen to be
 "behind or unpaid by the space of twenty-one days next over or
 "after the days or times whereon the same was appointed to be paid,
 "as aforesaid, that then and in such case it should and might be
 "lawful to and for the said Thomas Bomins and David Hutcheson,
 "or the said Mary Hutcheson otherwise Trench, into and upon the
 "said lands and premises, in the said plaint mentioned, and all other
 "the lands out of which the said jointure or yearly sum of £50 was
 "made payable, and every part or portion thereof, to enter and dis-
 "train, and the distress or distresses then and there found to dispose
 "of according to law, until the said annuity or yearly sum of £50,
 "and all arrears thereof, and all costs and charges which might be
 "occasioned, accrued or sustained, by reason of the non-payment
 "thereof, or of the taking or disposing of the said distress or dis-
 "tresses, or recovery of said jointure, should be fully paid off and
 "satisfied."

The plea then stated the death of John Trench, on the 1st of May 1849, and the accruer of nine and a-half years' arrear of the jointure, and justified the taking as a distress for this arrear.

The plaintiff demurred, and the material points noted for demurrer were these:—That the defence did not show compliance with the 9 & 10 *Vic.*, c. 111, ss. 10 and 12.

That the defence did not show the title of John Trench, or that he was seised in possession, or that he had any title, right or power which enabled him to charge the lands with the rentcharge.

That it did not appear by the deed referred to that the rentcharge

M. T. 1859. was effectually charged on the lands, or that Mary Trench had any
Exchequer. legal power or right to enter and distrain.
 GOGGINS
 v.
 TRENCH.

The deed referred to in the pleadings, so far as it is material for the purposes of this report, was in the following terms :—" Indented "articles of agreement of intermarriage, made the 28th day of "January 1804, between Hubert Hutcheson, of the first part, "Mary Hutcheson, of the second part, John Trench, of the third "part, Thomas Bomins, of the fourth part, and David Hutcheson, "of the fifth part; and whereas the said John Trench is seised and "possessed of the towns and lands of Carrane, of which Drimree, "Cloonskaghagh and Magherbane are subdenominations." The deed then witnessed that John Trench, in consideration of the marriage, and of ten shillings, and by virtue of a bargain and sale to them, the said Thomas Bomins and David Hutcheson, thereof made by the said John Trench, and by force of the statute for transferring uses into possession, had bargained, sold, assigned, transferred and made over, and by said presents did grant, bargain, sell, assign, transfer and make over, unto the said Thomas Bomins and David Hutcheson, and to the survivor of them, and to the heirs of such survivor, the lands mentioned, to hold "unto the said Thomas "Bomins and David Hutcheson, and to the survivor of them, and "to the heirs of such survivor, for and during the term of 500 years, "without impeachment of any manner of waste, in trust, never- "theless, and to and for the uses, intents and purposes thereafter "mentioned, expressed and declared, of and concerning the same; "that is to say, to and for the use and benefit of the said John "Trench, for and during the term of his natural life," with certain trusts for the benefit of the issue of the marriage, and an ultimate limitation to the right heirs of John Trench. "And for the further "use, intent and purposes, and it is the true intent and meaning of "these presents, to permit and suffer the said Mary Hutcheson, in "case said intended marriage shall take effect, and that the said "Mary shall survive her said intended husband, then and in such "case to suffer the said Mary to take and receive, yearly and every "year during her natural life, the sum of £50 sterling, payable half- "yearly, the first half yearly payment to commence on the death of

"said John Trench, and be made payable in six months after his
 "decease; and, in case said jointure or yearly sum of £50 sterling,
 "or any part thereof, shall happen to be behind or unpaid within
 "twenty-one days after the days appointed for the payment thereof,
 "then and in such case it shall and may be lawful to and for the
 "said Thomas Bomins and the said David Hutcheson, or the said
 "Mary Hutcheson, to enter upon and distrain the said lands and
 "premises, and every part thereof; and the distress and distresses
 "then and there found to dispose of according to law, for payment
 "of said jointure of £50 sterling a-year, and all arrears thereof,
 "and all costs and charges attending the taking and disposing of
 "said distress or distresses, and the recovery of said jointure."

M. T. 1859.
Exchequer.
 GOGGINS
 v.
 TRENCH.

W. Bourke and J. W. Carleton, in support of the demurrer.

Serjeant Fitzgibbon and C. Palles, contra.

The arguments sufficiently appear in the judgments.

Cur. ad. vult.

PIGOT, C. B.

The principal question argued before us was whether, by the deed of the 28th of January 1804, the defendant Mary Trench was entitled to distrain for the arrears of a yearly rentcharge of £50 Irish? This question involves the consideration of a principle of law, sanctioned by very ancient authority, though not, that I am aware of, applied in any modern reported case. The deed being produced on the argument, under the 87th section of the Common Law Procedure Act, we are enabled to form an opinion upon its legal effect, as if it had been, according to the old practice, set out on *oyer*. For the purpose of its construction I assume, for reasons which I shall hereafter mention, that the grantor was seised of some estate of freehold when he executed the deed; and, further (in the absence of any allegation to the contrary), that such estate, subject to the modifications made by the deed, is still continuing.

E. T. 1860.
 April 19.

The deed is very informally and untechnically framed. It contains some limitations which seem void for remoteness. It seeks

E. T. 1860.
Exchequer.
 GOGGINS
 v.
 TRENCH.

to use a term of 500 years for declaring trusts, extending to the entire inheritance. It begins as if it were intended that it should be altogether executory; but it uses words indicating a clear intention that it should operate so as to vest a present estate in Thomas Bomins and David Hutcheson, the trustees. The granting part begins by professing to create that estate. The deed then declares the trusts of the term; and one of these is, that the trustees "shall permit and suffer the said Mary Hutcheson" (the defendant), "in case said intended marriage shall take effect, " and that the said Mary shall survive her said intended husband, " then and in such case to suffer the said Mary to take and receive, " yearly and every year during her natural life, the yearly sum of " £50 sterling, payable half-yearly; the first half-yearly payment " to commence on the death of the said John Trench, and be made " payable in six months after his decease." It then proceeds thus: " And in case the said jointure or yearly sum of fifty pounds sterling, " or any part thereof, shall happen to be behind or unpaid within " twenty-one days after the days appointed for payment thereof, " then and in such case it shall and may be lawful to and for the " said Thomas Bomins and the said David Hutcheson, *or the said* " *Mary Hutcheson*, to enter upon and distrain the said lands and " premises, and every part thereof, and the distress and distresses " there and then found to dispose of according to law, for payment " of said jointure of fifty pounds sterling a-year, and all arrears " thereof, and all costs and charges attending the taking and dis- " posing of said distress or distresses, and the recovery of said " jointure." If there had been, first, a grant of the rent (by way of limitation of a use or otherwise), and then a demise to the trustees for a term to secure the payment of the rent, the deed would in substance (as to the rent) have nearly pursued the ordinary form used for the creation of a rentcharge. First, there would have been the grant of the rent, with a power of distress to the grantee, making it a legal rentcharge. Then there would have been the creation of a term vested in trustees, for the purpose of enabling them not only to enter and take the profits, or to sell or mortgage, for the payment of arrears, but also to distrain, and,

as owners of the immediate reversion, to avow generally, under the statute, if, upon a distress being made, a replevin should be brought by a tenant holding under a tenancy created prior to the deed. But under the grant of the rentcharge (if properly framed with the usual power of distress), the grantee of the rent also could herself avow, in her own right, showing title to the rentcharge, derived from the owner of the fee, by an avowry framed in accordance with the decision in *Bulpit v. Clarke* (a), and in the manner in which, in effect, the present avowry is drawn. If, then, this deed contains words which, by construction of law, and in the terms in which the power is given to distrain, amount to a grant of a rentcharge, the deed will be found in substance to differ from the ordinary mode of creating a rentcharge, with a legal estate in trustees to secure it, only in this, that instead of the provision which creates the rentcharge following, it precedes, the part of the deed by which the trust estate is created. We are at liberty, and are bound, in construing this instrument, to ascertain, as far as its contents enable us, what the parties intended, and to give effect to their intention, if that can be done by a reasonable construction of their words. Three things are abundantly shown, on the face of the instrument, to have been intended by the parties to the deed:—first, that Mary Trench should have an annual sum by way of jointure of £50 for her life, after her husband's death; secondly, that this annual sum should come out of the lands which the deed purported to vest in trustees; thirdly, that Mary Trench herself, as well as the trustees, should have a separate power of distress upon the lands for recovery of the jointure and its arrears: and, in my opinion, the third of these intentions is conveyed in words sufficient, according to long established authority, to grant a legal rentcharge to Mary Trench.

It is laid down in *Littleton*, s. 221 (*Co. Lit.* 146, b), that “If one make a deed in this manner, that if A of B be not paid at the feast of Christmas, for term of his life, xxs. of lawful money, that then it shall be lawful for the said A of B to distreyné for this in the manor of F, &c.; this is a good rentcharge,

(a) 1 N. R. 56.

E. T. 1860.
Eschequer.
 GOGGINS
 v.
 TRENCH.

E. T. 1860. “because the manor is charged with the rent by way of distress;
Erchequer.
 GOGGINS
 v.
 TRENCH. “his deed, any annuitie to the said A of B, but granteth only that
 “he may distreyne for such annuitie,” &c. The doctrine stated in
 this text of *Littleton* is confirmed in a current of authorities, flow-
 ing from very early times. Among those authorities are *The*
Year-book, 9 H. 6, c. 9, pl. 23, abstracted in *Brooke's Abr.*, *Rentes*,
 pl. 1, and *Fitzherbert's Abr.*, *Grauntes*, pl. 6; *The Book of Assize*,
 p. 26; *Ass.*, pl. 38, fo. 126, per *Skipwith*; *Br. Abr.*, *Grauntes*,
 pl. 73; and 41 *Ass.*, pl. 3, per *Persey*. In 1 *Dyer*, p. 22, pl. 141, it
 was said by Portman, J., “If I grant to you to distrain for ten
 “shillings annually on my land, that is a rentcharge of ten shil-
 “lings.” In *Butt's case* (a), it is thus laid down:—“If I grant
 “unto you, that you and your heirs shall distrain for a rent of
 “forty shillings within my manor of S, this, by construction in law,
 “shall amount to a grant of a rent out of my manor of S; for if it
 “should not amount to a grant of a rent, the grant should be of
 “little force or effect, if the grantee shall only have a bare distress,
 “and no rent in him; for then he should never have an assize
 “thereof, &c.; and that is the reason that it is often ruled and
 “resolved, that it shall amount to a grant of a rent, by construction
 “of law; *ut res magis valeat.*” The same proposition is to be
 found in *Co. Lit.*, p. 147 a. Many authorities, including those
 which I have mentioned, are cited in 7 *Rep.*, p. 24 a, from the *Year-*
book, and several others are quoted in the margin. The authorities
 are also collected in 1 *Plowd.*, p. 139, in the margin; and in
 19 *Vin. Abr.*, p. 474, tit. *Rent*, D, especially at pl. 5. I may also
 refer to 1 *Bacon's Abr.*, *Annuity*, B; and *Gilbert on Rents*,
 pp. 38, 39, *et seq.* *Lord Coke*, in his *Commentary* on a. 221 of
Littleton, p. 146 b, says, that the section is imperfect in not having
 these words, “that he *grants* to A of B, &c., that if A of B,” &c.
 and he says these words are in the original. It appears, however,
 from the note, that they are not in either of the two copies of
Littleton mentioned by Mr. *Hargrave* in his preface to his edition

(a) 7 *Rep.* 24 a.

of *Coke on Littleton*, the Rohan copy, or that of Lettou and Machlinia. And I apprehend there can be now no doubt that, though the word "grant" be omitted, the deed may operate as a grant, if that be necessary to give effect to the intention apparent from the contents of the instrument. See the observations of Lord Kenyon, in *Shove v. Pincke* (a); *Purifie v. Gryme* (b). *Holmes v. Seller* (c) (though cited in 15 *Vin. Abr.*, p. 105, *Grant*, S, 8) is not a direct authority; but it shows the disposition of a Court of Law in reference to such intention. The numerous cases in which words of covenant or agreement have been held, in order to effectuate intention, to operate a present demise of lands, are authorities to show the force which the law gives to intention plainly apparent, without regard to the form of words in which it is conveyed. The older cases, including *Tisdale v. Essex* (d), are collected in 2 *Platt on Leases*, p. 23, and in 1 *Furlong's Landlord and Tenant*, p. 136. In the margin of 1 *Bacon's Abr.*, *Annuity*, B, there is the following passage, for which the authority is not cited, but it will be found in Lord Chief Baron *Gilbert's Treatise on Rents*, p. 39:—"For, in many cases, without words of granting, the law creates a rentcharge, because it is the design of the law to render all contracts binding and effectual, so far as the intention of the parties may be gathered from the deed; and such interpretation is made strongest against the grantor, because he is presumed to receive a valuable consideration for what he parts with." And *Lord Coke*, in commenting upon the same section of *Littleton* before cited, s. 221, says, p. 147 a, "And yet no rent is expressly granted out of the manor. But by the grant that he shall distreynne for such a yearly summe of money, in judgment of law the manor is charged with the rent."

The reason in *Butt's case* (e) applies with peculiar force to the deed now before us. Unless we shall hold that a legal rentcharge was granted by it to Mary Trench, the power of distress given in express terms to her, so far as it has any operation, would be merely

E. T. 1860.

Eschequer.

GOGGINS

v.

TRENCH.

(a) 5 T. R. 129.

(b) Cro. Jac. 292.

(c) 3 Lev. 305.

(d) Hob. 34; S. C., Moore, 861.

(e) 7 Rep. 24 a.

E. T. 1860. Exchequer.
 GOGGINS
 v.
 TRENCH.

to take the goods, but would include no authority to sell them under the 7 W. 3, c. 22, ss. 4 & 5, (*Ir.*), analogous to 2 W. & M., sess. 1, c. 5 (*Eng.*). Not only, *ut res magis valeat*, ought the Court to avoid giving such a construction to the deed, but the words themselves of the deed furnish a further reason against it; for they show that the purpose of the power of distress was, that the goods distrained should be "disposed of" for "payment" of the jointure, and "all arrears thereof;" plainly indicating that the parties contemplated a sale of the goods distrained. If the deed were construed as giving a power of distress on non-payment of an equitable rent only (which could not, for this purpose, be regarded at law), the result would be that the distress would be sustainable only in the manner in which the distress was supported in *Pollitt v. Forrest* (a), in which the avowry was upheld as disclosing a right to distrain as for a *nomine pene*, or penalty: and see *Chapman v. Beecham* (b). Even in that view this avowry might be upheld, as substantially showing a right to distrain, though not for rent in arrear. But, then, in that case there could be no judgment under the 7 W. 3, &c. (corresponding to the 17 Car. 2, c. 7, *Eng.*), for the amount of the rent in arrear, "or so much thereof as the goods distrained amount to:" *Pollitt v. Forrest*. The judgment could only be *de retorno habendo*; and the goods distrained, when returned, would be mere unproductive pledges, which might be kept by the distrainer, subject to many risks and inconveniences, but which could not be sold.

I am, therefore, of opinion, *reddendo singula singulis*, and in order to give effect to the power of distress expressly given to Mary Trench for payment of the jointure of £50 a-year, that we ought to treat the clause giving that power, expounded by the context, as granting a rentcharge to her; that we may (if necessary) treat that clause, and the portion of the instrument which gives the term of 500 years to the trustees, as if they were respectively transposed, so as to read the deed as if the grant of the rent had preceded the creation of the term; and that, whether we do or do not transpose these parts of the instrument, we may and

(a) 11 Q. B. 949.

(b) 3 Q. B. 723.

ought to give effect to the entire as if it were, in the usual and simple form, a grant of a rentcharge, with a term to secure it, vested in trustees. If authorities were needed for reading the instrument by such a transposition of its clauses, they are abundantly supplied in the books: 14 *Vin. Abr.*, tit. *Grant*, particularly pl. 20, 54, 55, 56, 57; *Broom's Maxims*; *Ex antecedentibus et consequentibus fit optima interpretatio*. Willes, C. J., in *Parkhurst v. Lessee of Dormer (a)*, says:—"The law is not nice in "grants; and, therefore, it doth often transpose words contrary to "their order, to bring them to the intention of the parties."

In the view which I have here taken of the deed, it is unnecessary to call in aid a construction of it which, however, would not be without authority to sustain it. The deed being the deed not only of the settlor, but also of the trustees (whose seals and signatures it bears), the rentcharge, created by the power of distress, and the context, may, without any transposition of the words or clauses, be treated as creating the rent out of the estate, either of the settlor, or of the trustees. It is laid down in *Co. Lit.*, p. 147 *b*, that if A doth bargain and sell land to B, by indenture, and before enrolment, they both grant a rentcharge by deed to C; and after the indenture is enrolled, "the grant is good; and after the enrolment it shall be the grant of B, and the confirmation of A. But "if the deed had not been enrolled, it had been the grant of A, and "the confirmation of B; and so *quâcunque viâ datâ*, the grant is "good." As to different operations of the same deed, in reference to the interests of different parties, I may cite, without further observation, *Doe v. Bingham (b)*; 14 *Vin. Abr.*, *Grants* (H, 18), pl. 3; per Hutton, J., *Sir William Jones*, p. 26; *Doe v. Lock (c)*; *Wickham v. Hawker (d)*.

The avowry was further objected to on the ground that it does not show what estate John Trench had in the lands, when he executed the deed of the 28th of January 1804; the only statement of his interest being, that he was "seised" of the lands. There can be no doubt that, before the Common Law Procedure Act, the

E. T. 1860.
Exchequer.
GOGGINS
v.
TRENCH.

(a) Willes, 332.

(b) 4 B. & Ald. 672.

(c) 2 Ad. & Ell. 705, 743.

(d) 7 M. & W. 63.

E. T. 1860. *Eschequer.*
 GOGGINS
 v.
 TRENCH.

avowry would, on this ground, have been bad on special demurrer, for want of certainty. But the preponderance of authority appears to be in favour of holding that it would be upheld after a pleading over, or on general demurrer; and if that be so, the party making the objection can now avail himself of it only by a motion to set the pleading aside. In *Hobson v. Middleton* (a), Bayley, J., lays down that, though an equivocal expression (which a general statement of seisin is, for it may be seisin in fee, or for life, or for any other estate of freehold) is, generally, to be construed *against* the pleader, yet, when the opposite party has pleaded over, that is an admission that the expression is to be taken in the sense which will support the previous pleading. A similar view was intimated by Mr. Justice Maule, in *Boydell v. Harkness* (b), and was expressed by the Lord Chief Justice of the Court of Common Pleas, in his judgment in *Ruckley v. Kiernan* (c). In *Harris v. Beavan* (d), a general allegation of seisin was held cured after verdict, although no traverse was taken upon it. Lord Chief Justice Best is reported in 1 *M. & P.*, p. 641, to have said, that "the ambiguity is cured by pleading over;" but, in the other report, the expression is added, "and the finding of the jury." It is, therefore, not a direct authority. *Serjeant Williams*, in the note, 1 *Saund.*, p. 347, c. n. (6), treats this as a subject of special demurrer, citing *Saunders v. Hussey* (e), also reported in *Carth.*, p. 9, and 1 *Lord Raymond*, pp. 332, 333. From the reports in *Carthew* and in *Lutwyche*, it would appear as if the Court considered that the objection was matter of substance. But the account of the case given as a note in the report of *Silly v. Dally* (f), which is much more full than the reports in *Carthew* and *Lutwyche*, shows that the Court differed: Powel, J., considering the omission to specify the estate matter of substance, and Treby, C. J., saying that "it was but form; for no man can be seised of a less estate than a freehold." *Serjeant Williams* appears to adopt the latter view. But in the case of *Payne v. Brigham* (g), the very point

(a) 6 B. & C. 302; S. C., 9 Dowl. & RyL. 249.

(b) 3 Com. B. 172-3.

(c) 7 Ir. Com. Law Rep. 79-80.

(d) 4 Bing. 646; S. C., 1 M. & P. 633.

(e) 2 Lut. 1231, 1232.

(f) 1 Lord Ray. 331, 332, 333.

(g) 2 Lut. 1313, 1316.

now before us upon this part of the present avowry was, in principle and effect, determined on a plea of justification in trespass. That was trespass *quare clausum fregit*, and *de bonis asportatis*, in the taking of five loads of hay. The defendants justified by stating that one of the defendants was seised of the tithes in the *locus in quo*; and that he, in his own right, and the others as his servants, entered and took the five loads of hay, being the one-tenth of the hay there, severed from the remainder. There was a replication, which was held ill on demurrer. The plaintiff then objected to the plea, for not stating the estate for which the defendant was seised of the tithes; "*sed non allocatur*." The Court held otherwise, upholding the plea. This appears to me to be a direct authority. Though an old one, it is not opposed by a contrary decision; and it is supported by the opinions which I have cited from the other books, and by the rule of pleading to which I have adverted. I, therefore, think we ought not to treat this objection as sufficient to invalidate the avowry.

The remaining point of objection to the answer is the omission to show that the requisites of the statute 9 & 10 Vic., c. 111, s. 10, were complied with. That this is necessary in a plea of justification in trespass, was expressly decided by the Court of Common Pleas in the case of *Madden v. Bryan* (a). In *Spratt v. Murphy* (b), also an action of trespass, there was, in the plea, an allegation that the defendant distrained, "according to the form of the statute in such case made and provided." There was a demurrer to the plea. Perrin, J., held that this was a substantial averment that the requisites of the statute had been complied with; and on that ground was of opinion that the plea was good. The Lord Chief Justice, though he treated the case as distinguishable from *Madden v. Bryan*, and did not expressly suggest the overruling of the decision in that case, nevertheless expressed an opinion apparently at variance with it. But Moore, J., and Crampton, J. (especially the latter), were of opinion that the Court ought to abide by the judgment pronounced by a Court of co-ordinate authority, in *Madden v. Bryan*, Crampton, J., giving several reasons for upholding that decision. In *Brennan v.*

E. T. 1860.

Eschequer.

GOGGINS

v.

TRENCH.

(a) 1 Ir. Com. Law Rep. 322.

(b) 6 Ir. Com. Law Rep. 489.

E. T. 1860. *Flood* (a), the Court of Queen's Bench, and in *Bewley v. Haughton* (b), Baron Pennefather upheld a general avowry by a landlord, for rent in arrear, under the 25 G. 2, c. 13, not containing any averment of compliance with the 9 & 10 Vic., c. 111, s. 10, on the ground that the statute did not, as to the privilege of pleading by a general avowry, repeal the former statute. In the case before us the avowry cannot be maintained under the statute 25 G. 2, c. 13, and must be supported, if at all, at Common Law.

Exchequer.
GOGGINS
v.
TRENCH.

Two questions arise: first, shall we follow the decision of the Common Pleas, if it applies? secondly, does it apply? I take them in that order, as the most convenient. First, I think we are bound by the decision of that Court, if it applies. Two Judges of the Court of Queen's Bench have already referred to it as an authority; a third did not deny it; the fourth did not profess (as I collect) to overrule it. It appears to me that Mr. Justice Crampton's judgment in *Spratt v. Murphy* gives the most satisfactory reasons for his opinions on this point. I think, with him, that this is a case in which we ought to defer to the judgment of a Court of co-ordinate jurisdiction. Stability and certainty, in the rules which are to regulate suitors and their advisers, are of especial importance in matters of mere procedure, such as this is. It may be well to advert to a few examples, showing, on the one hand, the course adopted by Judges of the highest authority, in so abiding by what has been once solemnly considered and determined, and showing, on the other, the great inconvenience resulting from a different course having been sometimes followed. In *Sharpe v. Wagstaffe* (c), the Court of Exchequer in England, though plainly dissenting from a decision of the Court of Queen's Bench on the effect of an Act of Parliament,* felt themselves bound by that decision, and followed it, expressly on the ground that they were "only a Court of concurrent jurisdiction." The statute 1 & 2 G. 4, c. 78, enacted that the acceptance of a bill of exchange should be treated as a general acceptance, unless it should express that it should be payable at a banker's house, or other place only, and not otherwise or elsewhere.

(a) 4 Ir. Com. Law Rep. 332.

(b) 7 Ir. Com. Law Rep. 263.

(c) 3 M. & W. 521.

* The Apothecaries Act, 55 G. 3, c. 194.

Lord Tenterden thought it also clear that this Act did not apply to a bill made payable, *in the body of it*, at a particular place; that in *Fayle v. Bird* (a), he nonsuited the plaintiff. The judgment of the Court of Common Pleas, ruling otherwise, in *Selby v. Eden* (b), was not then reported. When the case of *Fayle v. Bird* (c) came before the Court *in Banc*, though Lord Tenterden declared that he "should certainly have doubted whether this case fell within the statute 1 & 2 G. 4, c. 78, had it not been for the authority cited" (*Selby v. Eden*), he nevertheless reversed his own *Nisi Prius* decision, and followed that of the Court of Common Pleas, stating as his reason, that "it is of the highest importance that there should be *uniformity in the decisions of the several Courts of Westminster Hall upon all questions*, but especially upon questions affecting negotiable instruments of this description." Upon this very question, of general and special acceptances of bills of exchange, a long controversy had for several years subsisted between the Courts of King's Bench and Common Pleas in England, which caused great uncertainty and inconvenience, which was ultimately terminated by the decision of the House of Lords in *Rowe v. Young*; but in the course of which a practice had prevailed in the accepting of bills of exchange, rendering necessary the passing of the statute 1 & 2 G. 4, c. 78, which enacted the reverse of what *Rowe v. Young* had decided; and upon this statute, and on the very points of the judgments in *Selby v. Eden* and *Fayle v. Bird*, a new controversy arose, and continued to exist for several years, in consequence of the decision of the Court of Exchequer in Ireland in *Roach v. Johnston* (d). In that case, this Court pronounced a judgment professing, expressly, to overrule *Selby v. Eden* and *Fayle v. Bird*. The result was, that for a series of years the law affecting the acceptances of bills of exchange was administered according to two distinct rules, operating, so far as they were applied, as two distinct laws, directly opposed to each other, on the one side by the Courts in England, on the other side by the Court of

E. T. 1860.

Exchequer.

GOGGINS

v.

TRENCH.

(a) 2 Car. & Payne, 308. (b) 3 Bing 611; S. C., 11 Moore, 511.

(c) 6 Barn. & Cress. 531; S. C., 9 D. & Ryl. 639.

(d) Hayes & Jones, 246.

E. T. 1860. Exchequer in Ireland. The Court of Queen's Bench in Ireland, following the English decisions, determined in *Davis v. O'Hara* (a) in direct opposition to the judgment of this Court in *Roach v. Johnston*. The controversy was not closed until the year 1848. It appeared to be a mischief hardly tolerable in a commercial community, to live under what were substantially two opposite and conflicting laws, affecting the same subject-matter, and applied to that subject-matter according as the suitor chanced or chose to proceed in one Court or in the other. In 1848, fifteen years after the decision in *Roach v. Johnston*, the other Members of the Court concurred with me in opinion, that the time had come for redressing this mischief, by yielding to the opposing authorities in England and in Ireland; and this was done by our judgment in *Elliott v. Fiely* (b). We there overruled *Roach v. Johnston*, and followed the English authorities, although the majority of the Members of the Court (including myself) still dissented from the original judgment in *Selby v. Eden*. We all remember the inconveniences resulting from the difference in practice between the Courts of Queen's Bench and Exchequer in this country, in ejectments for non-payment of rent; this Court holding the affidavit of service to be part of the plaintiff's title; the Court of Queen's Bench holding differently; and the one Court nonsuiting in exactly the same circumstances in which the other directed a verdict for the plaintiff. A similar state of things existed during the controversy, as to the right of a plaintiff to maintain ejectment for non-payment of rent, without a legal reversion, between the Court of Queen's Bench, acting in conformity with its judgment in *Lessee of Fawcett v. Hall* (c), and this Court, abiding by its opposite decision in *Lessee of Walsh v. Feely* (d); a controversy which was at last terminated by the concurrence of this Court with the Court of Queen's Bench in *Lessee of Porter v. French*, (e): and there is now a very inconvenient difference between this Court and the other two Courts of Law, on a matter so small as the form of an affidavit to

(a) 5 Ir. Law Rep. 337.

(b) 10 Ir. Law Rep. 485.

(c) Alc. & Nap. 248.

(d) 1 Jones, 413.

(e) 9 Ir. Law Rep. 514.

be used in obtaining an order for security for costs; so that the same Judge, sitting in Vacation to hear motions for all the Courts, determines differently, upon facts precisely similar, according to the Court in which the action happens to be pending. I have taken this opportunity of stating, once for all, some of my reasons for the almost unconquerable reluctance which I feel, which I have long felt, which I have often expressed from this Bench, and which I believe will govern me as long as I have a seat on it, to deciding, even in accordance with my own strong opinions, against a judgment once deliberately pronounced by a Court of competent authority. I speak not of mere *dicta*, to which, I own, I pay little regard. They are not unfrequently loosely worded and imperfectly understood. They are very liable to be inaccurately reported, in reference to the discussion by which they are elicited; and they are for the most part used for discussion only, and not for judgment. Neither do I speak of cases in which the law casts upon the Judge, or the Court, the *obligation* of applying a discretion to particular circumstances in which the suitor is entitled to *require* the exercise of that discretion, and in reference to which previous exercises of similar discretion afford very imperfect guidance. I speak of a decision deliberately made, after argument and consideration, on a question clearly raised for judgment. Uncertainty must exist, to some extent, in the exposition of all human laws. Few subjects can be presented to different minds without suggesting different views; and cases *will* from time to time arise, in which hasty rules will be reviewed by co-ordinate tribunals. I believe these cases ought to be rare exceptions. I am sure that uncertainty—a great evil in jurisprudence—would be materially diminished, if the members of every tribunal were influenced by disposition rather to regard with acquiescence, than to scan with criticism, the decisions of other Judges. Although, therefore, I were disposed to differ from the judgment of the Court of Common Pleas in *Madden v. Bryan*, I should still, until it should be reversed by the proper tribunal (a Court of Error), defer to it as an authority. But I am not, as at present advised, disposed to dissent from that decision. It is founded on the very intelligible proposition

E. T. 1860.

Eschequer.

GOGGINS

v.

TRENCH.

E. T. 1860. *that the rule of pleading laid down in Stephen on Pleading, 4th ed., p. 402, in reference to acts "valid at Common Law, but regulated as to the mode of performance by statute," only applies where the statutable requisites are comprised in, and could be proved under, the Common Law allegation. This cannot be said of the word "distrain," which does not necessarily import a *distraint according to law*. If the rule referred to applied to such a case as *Madden v. Bryan*, then the question of compliance or non-compliance with the requisites of the statute would be open upon a mere traverse, stating "that the defendant did not distress," and there would be no necessity for one party to allege compliance, or for the other party to allege non-compliance, with those requisites. So applied, this would be a very inconvenient rule of pleading; for it would expose a defendant to the difficulty of going to trial without knowing whether what the plaintiff relied on was, that there was in fact no distress at all, or that the distress was made in contravention of the provisions of the Act of Parliament. I may observe that the rule referred to in *Stephen on Pleading*, p. 403, 4th ed., is laid down in somewhat different terms (more limited and guarded) in 1 *Wms. Saund.*, p. 277 A, n. (2); p. 211 n. (2); p. 276 n. (1). It is there stated as founded on the *Anonymous* decision in 2 *Salk.*, p. 519; which is in nearly the same terms as that in *Birch v. Bellamy* (a), and is (as the Lord Chief Justice says in *Madden v. Bryan*) probably only another version of the same case. According to those authorities, the rule applies where, at Common Law, a matter might have been lawfully done by parol; but where a statute, altering the Common Law, requires that matter to be done in writing, or requires, in reference to it, a writing, as evidence of what is done, there the Common Law allegation describes the thing as having been done, without stating whether it was or was not done by parol. The same allegation, with equal truth, describes the thing as having been done, whether it was or was not done in writing, or whether it is or is not evidenced by a writing. The Common Law allegation, therefore, lets in no proof of either; and the question, whether or not it was done lawfully under the statute, arises upon the evidence. *Serjeant Stephens**

refers to a passage in the *Year Book*, 4 *Hen.* 7, c. 8, which seems to sanction a larger extension of the rule. But I am not aware of any authority which decides that, where a statute requires certain things to be done or to happen, as a condition for the conferring of a right to do a certain act (as in the present instance for the conferring of a right to distrain), the party claiming such right, and justifying by reason of it an act which, without it, the statute makes a tortious act, is not bound to show, in a plea justifying such act, that the condition has been complied with which the law makes necessary for the acquisition of the right to do it. I must further observe that (entirely concurring with Mr. Justice Crampton's observations on this subject in *Spratt v. Murphy* (a) it seems to me the far more convenient course, with a view to the Common Law Procedure Act, that the defendant should state his whole case in his defence, and should thus take away the necessity for a replication; especially where the requisites for justifying the act complained of, and the manner in which they have been complied with (so far as relates to the 9 & 10 *Vic.*, c. 111, s. 10), are all within the defendant's knowledge, are very simple in their nature, are perfectly well understood, and may be stated without any inconvenient length in pleading.

Secondly—I think the principle of the decision in *Madden v. Bryan* applies directly to an avowry at Common Law. The general rule is, that an avowry at Common Law must show a good title *in omnibus*. Several of the authorities are collected in *Wilkinson on Replevin*, p. 53; 1 *Saund.*, p. 347 C, n. 3; 2 *Saund.*, p. 285, n. 3; 2 *Saund.*, p. 314, n. 3. The rule is stated or illustrated in *Goodman v. Ayling* (b); *Mathews v. Carey* (c); *Crosse v. Bilson* (d); *Hawkins v. Eckles* (e). These authorities show that more strictness is required in an avowry than in a plea of justification in trespass; because in an avowry the defendant ought to show a right to a return of the goods. Independently of authority, the very nature of the action of replevin indicates that the defendant ought to show at

E. T. 1860.

Eschequer.

GOGGINS

v.

TRENCH.

(a) 6 Ir. Com. Law Rep. 496.

(b) Yelv. 148.

(c) Carth. 74.

(d) 6 Mod. 102.

(e) 2 Bos. & Pul. 359, 361.

E. T. 1860.
Eschequer.
 GOGGINS
 v.
 TRENCH.

least *as* fully in an avowry his right to take the goods, as he must in a plea of justification, if sued for taking the same goods in an action of trespass. In the action of trespass the plaintiff complains that his goods were taken by the defendant. In replevin he does the same. The answer in each case is identical, where the right to take arises from a title in the defendant to distrain, as of his own right, at Common Law. In effect, the avowry is in the nature of a plea in bar, *Crosse v. Bilson* (a), so far as it justifies the taking, and in the nature of a count: *Butt's case* (b); *Co. Lit.*, 303 a, so far as it claims a return of the goods. The Statute of General Avowries then being out of the case, the decisions of *Brennan v. Flood* and *Bewley v. Haughton* not being applicable, and this being an avowry at Common Law, I am of opinion that it is within the authority of *Madden v. Bryan*. I am, therefore, constrained to hold (and I do so in this case with reluctance) that the defendant not having shown a compliance with the peremptory requisites of the statute (9 & 10 Vic., c. 111, s. 10), without which the statute expressly makes the distress "unlawful and void," the avowry is bad, and, for this cause, the demurrer ought to be allowed.

Enough, however, appears before us to show that we ought to allow the defendant, on the usual terms of paying the costs, to amend the avowry.

FITZGERALD, B.

The questions in this case arise on a demurrer taken by the plaintiff in replevin to the avowry and cognizance of the defendants.

The avowry and cognizance states, in substance, that one John Trench was, at the time of the execution of the deed after mentioned, seised of, *inter alia*, the *locus in quo*; and, being so seised, by an indenture dated 28th of January 1804, executed in contemplation of his marriage with the defendant Mary, he granted to Bomins and Hutcheson, and the survivor of them, and the heirs of such survivor, *inter alia*, the *locus in quo*, to hold to them for the term of 500 years, in trust to permit and suffer the defendant

(a) 6 Mod. 102.

(b) 7 Rep. 25 a.

Mary, in case she should survive him, to take and receive yearly, during her natural life, the sum of £50; the first half-yearly payment to commence to accrue from the death of John Trench, and to be payable in six months after his decease, and to be issuing out of and charged upon, *inter alia*, the *locus in quo*; and that, by the same indenture, John Trench covenanted, in case the said jointure or yearly sum, or any part thereof, should happen to be unpaid for twenty-one days, that it might be lawful for Bomins and Hutcheson, and also for the defendant Mary, upon, *inter alia*, the *locus in quo*, to enter and distrain.

E. T. 1860.
Eschequer.
 GOGGINS
 v.
 TRENCH.

The avowry and cognizance then avers the death of John Trench; that after his death nine and a-half years of the annuity were in arrear, for which the taking of goods complained of was made by way of distress, the defendant Mary avowing, and the other defendant making cognizance as her bailiff.

To this avowry and cognizance a demurrer was taken by the plaintiff, and the principal points relied on to sustain it were these:—

First.—It was said that the avowry shows no compliance with the provisions of the statute 9 & 10 Vic., c. 111, which makes the service of a certain notice by the party distraining necessary to the validity of a distress.

Secondly.—That the avowry does not show of what estate the alleged grantor of the rentcharge, John Trench, was seised, or that he had any estate enabling him to grant it.

Thirdly.—That the avowry does not show the creation of any legal rentcharge whatever in the defendant Mary, or any legal right in her to distrain; and this was the chief objection insisted on.

In aid of his demurrer the plaintiff has, as he was entitled to do, called for production of the instrument relied on as creating the rentcharge, which has been accordingly produced; and his argument on the third point has been, to a great extent, founded on what appears on that deed. The authorities referred to by him on that head seem to warrant that course, and to show that when the instrument has been so called for and produced, the pleading of

E. T. 1860. *Eschequer.*
 GOGGINS
 v.
 TRENCH. the party relying on it is to be dealt with as if the instrument, *in hæc verba*, were incorporated in his pleading. I am of opinion that the demurrer ought to be overruled, though I confess I have felt considerable doubt on the question arising on the third point which I have mentioned. With reference to the first point, that the avowry does not show compliance with the particulars which the statute 9 & 10 Vic., c. 111, has rendered requisite to the validity of a distress, I am of opinion that, inasmuch as the statute does not require that those particulars shall be stated in pleading, the form of pleading remains as it was before the statute. The rule in such cases is thus stated in *Bac. Ab., Statute* (L, 3):—"If a statute "make certain circumstances necessary to the validity of an Act "which was valid at the Common Law without such circumstances, "this does not alter the manner of pleading which was used before "the making of the statute."

This I apprehend to be a well settled rule of pleading, which ought not unnecessarily to be interfered with; and though, as was suggested during the argument, there may be authority for confining it to declarations, still an avowry is in the nature of a declaration, and is, as I conceive, to be dealt with, as to the matter before us, according to the rules of pleading applicable to declarations.

In the case of *Brett v. Rigden* (a), one of the objections to an avowry (p. 342) was, that it did not conclude with a verification, which unquestionably would have been a good objection to a plea in trespass, stating the same matter; but the exception was disallowed by the rule of the Court, because the defendant in his avowry is actor, for he shows his matter, which showing is like unto a count, and is to have a return which is in nature of a recovery; and therefore he is *quasi* plaintiff, in which case he shall not aver his avowry, for it is not usual for the plaintiff to aver his count, *but the defendant must*; for which reason the avowry is good, without saying *et hoc paratus est verificare*. The necessity that avowries for rentcharge should state, with the utmost particularity, every matter of title, and the authorities which so clearly show this, I do not question, but a reference to these authorities will show

(a) Plowd. 349.

that it is because the avowry is in the nature of a declaration, and as such makes claim for a return, that this particularity is required. They therefore afford no reason, but the contrary, for applying a different rule in pleading to avowries and declarations. I agree, however, that if there be express authority deciding that an avowry for rentcharge in this country must show compliance with the provisions of the 9 & 10 *Vic.*, we ought not lightly to overrule such authority.

I have carefully looked through all the cases cited on this branch of the argument, but I do not find that the proposition before us has been decided against the opinion which I entertain, though I confess I do not find it easy to acquiesce in all that has been decided. There are two classes of cases bearing on the question, which have been referred to. The first is that of actions of trespass for a wrongful distress, in which pleas of justification, not showing compliance with the requisites of the statute, have been disallowed by the Court of Common Pleas. But, inasmuch as there is some authority for the proposition that the rule of pleading on which I rely does not extend to pleas, and more especially as I find this distinction noticed by the Chief Justice of the Common Pleas, and acted on in one of the cases, I cannot treat these cases as authorities applicable to the case of an avowry, which is in the nature of a declaration. The other class is of avowries for rent-service, which have been held good, though they do not show compliance with the provisions of the 9 & 10 *Vic.*; but it is said that this was so held on the ground, and the ground only, that there is a particular statute, prior to the 9 & 10 *Vic.*, which gives a general form of avowry, in cases between landlord and tenant, but which does not apply to cases of rentcharge. I cannot regard these cases as authorities for the proposition for which they are cited. So far as they go, they decide that what was the proper form of avowry in cases between landlord and tenant, before the Act of the 9 & 10 *Vic.*, shall continue such, notwithstanding that statute. I cannot, therefore, consider them as involving a decision that, where the form of pleading antecedently to the Act of the 9 & 10 *Vic.* was

E. T. 1860.

Eschequer.

GOGGINS

v.

TRENCH.

E. T. 1860. regulated by the Common Law, and not by statute, a different rule
Eschequer. is to be applied.

GOGGINS

v.

TRENCH.

Secondly.—As to the second point, that the avowry does not show the nature or quality of the alleged grantor of the rentcharge, I am of opinion that the avowry is informal in that respect; but I am disposed to think the defect is one which, before the Common Law Procedure Act, could have been taken advantage of only on special demurrer; and as the plaintiff has not seen fit either to apply to have the avowry set aside as embarrassing, or to show, if he could do so, by pleading, a defect in the grantor's estate, it must, I think, be assumed, on the allegation that the grantor was seised, that he had a freehold estate sufficient to give effect to the provisions of the deed, pleaded according to its true construction.

Thirdly.—The objections to the deed creating the rentcharge are these:—It purports to grant the lands comprised in it to Bomins and Hutcheson, and the survivor of them, and the heirs of such survivor; *habendum* to them for a term of 500 years, and then purports to give the rentcharge, by way of use, on the estate so granted to them.

Now it is said the estate granted by the deed is only a term of 500 years; and, therefore, the rentcharge created by way of use on the grant is the mere trust of a chattel, which could not be executed by the Statute of Uses, and consequently there is no legal rentcharge. It was suggested that the grant in the premises being of a fee, the *habendum* for a term of years might be rejected as repugnant, and then the case of the rentcharge would be executed on the fee granted by the premises. To this, however, it was answered, that by no mode of construction in the present case could the *habendum* for the term of 500 years be rejected; and for this the fourth resolution in *Baldwin's case* (a) was relied on, which is this:—"Where to the estate limited by the premises, a ceremony is requisite to the perfection of the estate, and to the estate limited by the *habendum* nothing is required to the perfection and assurance thereof but the delivery of the deed; then

(a) 2 Rep. 23 a, 24 a.

“though the *habendum* be of a lesser estate than is mentioned in E. T. 1860.
 “the premises, the *habendum* shall stand.” Now in this case they Exchequer.
 say the conveyance of the estate in the premises cannot take effect GOGGINS
 as a lease and release, because there is no sufficient recital of a lease v.
 for a year ; and as upon a deed in the very words of that before us, TRENCH.
 the Court of Common Pleas has, in 7 *Ir. Com. Law Rep.*, p. 338,
 decided that the recital of a lease for a year was insufficient, it
 must, I presume, be held that the deed cannot operate as a lease
 and release to pass the estate mentioned in the premises.

Then it is said it cannot operate as a feoffment to pass the estate mentioned in the premises, for to that the ceremony of livery of seisin would be necessary. Neither, it is said, can it operate as a bargain and sale to pass the freehold estate mentioned in the premises, for to that enrolment would be necessary. And again, though it be true that the construction of a covenant to stand seised may be applied to an instrument which purports to grant in fee to trustees, not within the consideration of blood or marriage, if the uses declared be sustained by such consideration, this can only be done where the conveyance to the trustees is wholly inoperative ; but, if there be an operative conveyance to the trustees, as the fourth resolution in *Baldwin's case* shows there may be in the case for the term, the deed must operate according to that, the expressed intent. There being no way, therefore, of giving effect to the estate granted by the premises by delivery of the deed, the *habendum* of the term of years must stand, and the argument that the use on it, if the rentcharge is not a legal estate, remains unaffected. This argument seems to me well founded. On the other side it was then said that, supposing the deed does operate as the grant of a term for years, the trusts of the term are declared to be, first, for the husband for life, with certain remainders to the issue of the marriage, and an ultimate remainder to the grantor, which trusts either do, or purport to, exhaust the whole beneficial interest in the term ; and then follows a further trust, that the intended wife shall have a rentcharge : and it was said that this trust took effect not on the term, all the trusts of which were exhausted, but on the seisin of the grantor ; and, it being indifferent on what part of the deed it occurred, it

E. T. 1860.
Eschequer.
 GOGGINS
 v.
 TRENCH.

ought to be intended, in order to give effect to the intention of the parties, that the term was subject to it. There is, however, very considerable difficulty in adopting this mode of construction, because the deed recites an agreement that the grantor's estate shall be vested in trustees, upon the trusts and for the uses, &c., after declared; and by the terms of the deed the estate purports to be conveyed to the trustees, for such estate as the deed grants, on the trusts and for the uses after mentioned; and then the creation of the rentcharge is by the words "for the further use," &c. Now it seems very hard to say that this is not one of the trusts contemplated; and, though true it is that this occurs after declarations of trusts sufficient, if valid, to exhaust every possible interest in the term, yet the circumstance relied on by the defendants, that it is immaterial in what part of the deed a particular clause occurs, would only render it necessary to interpose this trust after that for the life of the husband; and then it would take effect, according to the declared intent, as a trust of the term, but create only an equitable estate. Then, however, it is said that, subsequent to everything now mentioned, there is what amounts to the grant of a legal rentcharge, in the clause or covenant that the wife shall have a right to distrain for the jointure; and there can be no doubt that the grant or covenant of an owner in fee, that his intended wife shall distrain on lands named, for the payment to her of an annual sum, may amount to the grant of a rentcharge. But to this it is answered, that the clause in question is a provision that *either* the trustees *or* the wife shall have a right to distrain for *the annual sum before mentioned in the deed*; in other words, for an annuity already created by trust on the term, and that, whatever the operation of the clause be, it can only be as an additional security for the equitable annuity; so that there is no mode in which the right of distress can take precedence of the term, which is not determined, and the existence of which is in fact necessary to give existence to the very annuity for which, and for which only, the remedy of distress purports to be given. I feel the force of this argument; but I think that my LORD CHIEF BARON has shown that it is not insuperable. The whole clause in question is this:—"And for the further use, intent

“and purpose, *and it is the true intent and meaning of these pre-*
sents, to permit and suffer the said Mary Hutcheson, in case the
 “said intended marriage shall take effect, and that she the said
 “Mary shall survive her said intended husband, then and in such
 “case to suffer the said Mary to take and receive, yearly and every
 “year, during her natural life, the sum of £50 sterling, payable
 “half-yearly, the first half-yearly payment to commence on the
 “death of the said John Trench, and to be made payable in six
 “months after his decease; and, in case said jointure or yearly sum
 “of £50, or any part thereof, shall happen to be behind and unpaid
 “within twenty-one days after the days appointed for payment
 “thereof, *then and in such case it shall and may be lawful for the*
said Thomas Bomins and the said David Hutcheson, or the
said Mary, to enter upon and distrain the said lands and pre-
 mises, or any part thereof, and the distress and distresses then
 “and there found to dispose of according to law, for payment of the
 “said jointure of £50 sterling a-year, and all arrears thereof, and
 “all costs and charges attending the taking and disposing of the
 “said distress and distresses, and the recovery of said jointure.”
 Now, in the terms of this clause I have it distinctly stated that the
 intent and meaning of the deed is, that the wife shall take and
 receive a yearly sum of £50, with a right to her to distrain for it.
 I know of no way of giving effect to this intent, other than by
 holding that she has a legal rentcharge; and I give, as it appears to
 me, full effect to the other words of the deed, by holding that the
 trusts of the term are a further security for its payment. My
 opinion, therefore, is, that the demurrer ought to be overruled.

E. T. 1860.
Exchequer.
 GOGGINS
 v.
 TRENCH.

HUGHES, B., concurred with the LORD CHIEF BARON.

T. T. 1860.

Exchequer.

LAWRENSON v. HILL.*

June 1, 12.

In an action against a Justice of the Peace, for acts done in the execution of his office, the proof of notice of action is a necessary part of the plaintiff's case, and must be given by him, though the want of it be not relied upon in pleading by the defendant.

THIS was an action of false imprisonment, brought by the plaintiff against Mr. Edward Eustace Hill, a Justice of the Peace for the county of Longford.

The case, upon a former stage of it, is reported *supra*, p. 177, where the pleadings are fully stated; and the verdict for the defendant having been on that occasion set aside by the Court, and a new trial directed, the case went down again for trial, and was tried before the Lord Chief Justice at the last Spring Assizes for the county of Westmeath. At the trial, the plaintiff went into evidence in support of the charge of false imprisonment, and proved the proceedings before the Petty Sessions Court, the issuing of the warrant by the defendant, and her arrest and committal under it, and then closed her case. The defendant's Counsel then called for a nonsuit, on the ground that the plaintiff had not proved any notice in writing of the action, pursuant to the provisions of the 9th, 10th and 12th sections of the 12 *Vic.*, c. 16 (the Protection of Justices Act). The Lord Chief Justice was of opinion that the proof of such notice was a necessary part of the plaintiff's case, and directed a nonsuit, and, on the plaintiff declining to be nonsuited, directed a verdict for the defendant.

C. Pallas having, in Easter Term, obtained a conditional order to set aside the verdict for the defendant, and for a new trial—

G. Battersby (with him *J. T. Ball* and *E. P. Levinge*) now showed cause.

The only question is, whether the defendant was bound to set up the want of the notice of action by his pleading, to entitle him to call for a nonsuit at the trial? We submit that the service of notice was a condition precedent to be performed by the plaintiff before she could maintain an action, and that its service should have been

* *Coram* FITZGERALD and HUGHES, BB.

proved as part of her case, independently of the defendant's pleading. The question depends on the construction of the 8th, 9th, 10th and 12th sections of the 12 *Vic.*, c. 16 (the Protection of Justices Act), taken in connection with the enactments of the Common Law Procedure Act 1853. The 8th section of the 12 *Vic.*, c. 16, enacts that no action shall be brought against any Justice for anything done in the execution of his office, unless the same be commenced within six calendar months after the act complained of shall have been committed. The 9th section provides that no such action shall be commenced against any such Justice until one calendar month at least after a notice in writing of such intended action shall have been delivered, stating the cause of action, and the Court, and the other matters mentioned in the section. The 10th section enabled the defendant to plead the general issue, and give any special matter of defence, excuse or justification in evidence under it. The 11th section provides for tender of amends by the defendant, and payment of money into Court; and then the 12th section enacts "That if, at the trial of any such action, the plaintiff shall not prove that such action was brought within the time hereinbefore limited in that behalf, or that such notice as aforesaid was given, one calendar month before such action was commenced, then and in every such case such plaintiff shall be nonsuited, or the jury shall give a verdict for the defendant." The 10th section has been repealed by the 69th section of the Common Law Procedure Act 1853; and we must now read the Act as if that section had never been in it. If the 9th section had stood alone, it might be said that the want of notice was matter of defence; but the 12th section expressly makes the proof of notice a part of the plaintiff's case. It will be said that the want of notice is a matter of "avoidance, excuse or justification," within the meaning of the 71st section of the Common Law Procedure Act 1853, which enacts that "In actions for wrongs, defences by way of denial shall take issue on some one, or more than one, material matter of fact alleged in the summons and plaint; and all defences which admit the matter complained of, but rely on matter of avoidance, excuse or justification, shall be so expressly pleaded." The want of notice is not matter of excuse

T. T. 1860.

Exchequer.

LAWRENSEN

v.

HILL.

T. T. 1860. or justification; it is independent of the matter complained of.
Exchequer.
 LAWRENSON v. HILL. The service of notice is a thing to be done to give the plaintiff a cause of action at all. *Martins v. Upcher* (a) shows how strictly the plaintiff will be bound by the notice of action served. There is a series of decisions upon an analogous Act in England, 55 G. 3, c. 194 (the Apothecaries Act), by which this case must be ruled. The 21st section of the Apothecaries Act enacts "That no apothecary shall be allowed to recover any charges claimed by him in any Court of Law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to or on the said 5th day of August 1815; or that he has obtained a certificate to practise as an apothecary from the said Master, Wardens and Society of Apothecaries, as aforesaid." It has been repeatedly held that this proof is part of the plaintiff's title, and that the defendant need not plead the non-compliance with the statute: *Morgan v. Ruddock* (b); *Shearwood v. Hay* (c); *Wagstaffs v. Sharp* (d).

J. E. Walsh and *W. J. O'Driscoll*, contra.

The 10th section of the 12 *Vic.*, c. 16, having been repealed, the Act must be read as if it had been there, and had been struck out. The 9th section provided certain matters of defence for a Justice of the Peace. The object of the 10th section was to take away the necessity of pleading specially the matters of defence provided by the 9th section. Then the question was upon whom, when the general issue, by statute, under the 10th section, was pleaded, the *onus probandi* was to lie? A special defence may be a defence to be raised by the party for whose benefit it was created. That was the difficulty solved by the 12th section, by which, when the issue properly arises, the *onus* of proving the special matters of defence is thrown upon the plaintiff. According to the defendant's argument, the 12th section would be nothing more than a re-enunciation of the enactment contained in the 9th. The want of notice of action is not the only special defence; and, if the defendant

(a) 3 Q. B. 662.

(b) 4 Dowl. P. C. 311.

(c) 5 Ad. & Ell. 383.

(d) 3 M. & W. 521.

be right, the Statute of Limitation provided by the 9th section need not be pleaded. The true construction of the whole statute, having regard to the repeal of the 10th section, is, that where there is any plea raising the special matter of defence, as the general issue by statute did, the *onus probandi* lies on the plaintiff. Secondly; we submit that, irrespective of the repeal of the 10th section, the defendant is bound, by the provisions of the Common Law Procedure Act 1853, to plead the want of notice. By the 62nd section, the venue in any personal action may be laid in any county where the plaintiff thinks proper; and the venue in actions against Magistrates is constantly laid in a different county from that in which the cause of action arose. One provision, therefore, of the 12 *Vic.*, c. 16, is plainly repealed. Then the 69th section abolishes the general issue by statute, and there are then only two defences which can be pleaded—one a denial of the matter complained of, and the other a defence which admits the matter complained of, and sets up something by which the effect of it is taken away. These are the only possible defences; and the 71st section deals with defences under that analysis. It cannot be said that the effect of the Justices Act is, that without a notice no cause of action ever arose. It is plainly, therefore, a defence admitting the matter complained of, and relying on matter of avoidance. How can it be said that a plea of the month's limitation, which stands on the same footing, is not a plea of confession and avoidance? Every argument applicable to the one equally applies to the other. With regard to authority, *Smith v. Pritchard* (a) shows that, unless it be by force of some special direction in the 12th section, the want of notice must be specially pleaded. *Bull v. Chapman* (b) and *Alcock v. Taylor* (c) are cases decided upon the same principle. In *Davey v. Warne* (d), the marginal note is, "Where an Act provided that a plaintiff should not recover in any action for anything done in pursuance of the Act, unless twenty-one days' notice of action should be given—*Held*, that the defendant must plead the want of such notice, or he could not avail himself

T. T. 1860.
Exchequer.
 LAWRENSEN
 v.
 HILL.

(a) 2 Car. & K. 699.

(b) 8 Exch. 444.

(c) 6 N. & M. 296.

(d) 14 M. & W. 199.

T. T. 1860. "of it." There the 57 *G.* 3, c. 29, s. 132, required a notice of
Exchequer.
 LAWRENSON v. HILL. action to be given, and enacted that no person should recover in
 any such action unless such notice should have been given. It
 was held by the Court of Exchequer that the want of that should
 be specially pleaded. Any decision upon the Magistrates Act in
 England is inapplicable, because there the general issue by statute
 may still be pleaded. Then we come to the decisions on the Apo-
 thecaries Act. *Shearwood v. Hay* and *Wagstaffe v. Sharpe* were
 decided mainly on the effect of the General Rule in England, of
 Hilary Term, 4 *W.* 4, that, "In all actions of assumpsit (except on
 "bills of exchange and promissory notes), the plea of non-assumpsit
 "shall operate only as a denial in fact of the express contract or
 "promise alleged, or of the matters in fact from which the contract
 "or promise alleged may be implied in law." The general issue
 is the same as if the defendant had said, "the facts of your case
 are not such that a promise can be inferred from them;" and the
 whole question was, whether the plea of non-assumpsit, thus inter-
 preted, put the plaintiff on proof of his qualification? The want of
 notice is a matter peculiarly within the knowledge of the defendant,
 and, as such, should be put forward by him. The practice, since
 the passing of the Common Law Procedure Act, has been to plead
 the want or insufficiency of the notice: *Collins v. Hungerford* (a);
Austin v. Twiss (b). The object of the Common Law Procedure
 Act was to narrow the issues between the parties; and that policy
 ought not to be disregarded in favour of Magistrates.

J. T. Ball, in reply.

Kirby v. Simpson (c) shows that the defendant here was entitled
 to notice of action. The object of a notice was not merely to enable
 the Magistrate to make amends, but to bind the plaintiff to a written
 statement of his complaint. The plaintiff is bound to prove the
 cause of action stated in the notice. If the proof at the trial be
 inconsistent with the complaint stated in the notice, the plaintiff

(a) 7 Ir. Com. Law Rep. 581.

(b) 8 Ir. Com. Law Rep. 30.

(c) 10 Exch. 358.

must fail. How could the defendant plead by anticipation an inconsistency between the notice and the proof?

Curr. ad. vult.

T. T. 1860.

Exchequer.

LAWRENSON

v.

HILL.

FITZGERALD, B.

This, so far as we are concerned with it, is an action for false imprisonment of the plaintiff. The defence pleaded is in substance that the defendant was a Justice of the Peace; that a charge was made against the plaintiff, which was duly heard and adjudicated on by the defendant and another Justice of the Peace at Petty Sessions; that, on evidence on oath before them, he believed the plaintiff guilty of stealing a key, the property of one Bond, and that he issued a warrant, under which the plaintiff was committed to stand her trial, which is the imprisonment complained of; and that the defendant acted *bona fide*, having jurisdiction. The case was tried before the Lord Chief Justice, at the last Spring Assizes for the county of Westmeath. An action in this form is sustainable against a Justice of the Peace only in the event of his acting without jurisdiction, or exceeding his jurisdiction. Into the facts proved at the trial it is unnecessary to enter, further than that it was shown by the plaintiff that the imprisonment complained of was made under colour of a warrant issued by the defendant, sitting as Justice at Petty Sessions with another Justice; but, from a former consideration of the case in this Court, it must be taken that the warrant was issued in a matter in which the defendant had not, or in which he exceeded his jurisdiction.

June 12.

At the close of the plaintiff's case the defendant's Counsel called for a nonsuit, on the ground that no notice in writing of the action was proved to have been given to the defendant previous to its commencement, pursuant to the provisions of the statute 12 Vic., c. 16. The Chief Justice, being of opinion that such notice was necessary to be proved on the part of the plaintiff, directed a nonsuit, and, on the plaintiff declining to be nonsuited, directed a verdict for the defendant. A conditional order having been obtained to set aside the verdict, cause was shown against such order, before my Brother HUGHES and myself, in this Term; and we are of

T. T. 1860. *Exchequer.*
 LAWRENSEN
 v.
 HILL.

opinion that the cause shown must be allowed, and that the verdict ought to stand. By the 8th section of the 12 *Vic.*, c. 16, it is enacted that no action shall be brought against any Justice of the Peace, *for anything done by him in the execution of his office*, unless the same be commenced within six calendar months next after the act complained of shall have been committed. By the 9th section it is enacted that no *such* action (that is, in my opinion, an action for anything done by him in the execution of his office) shall be commenced against any Justice of the Peace, until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode, by the party intending to commence such action, or by his attorney; in which said notice the cause of action, and the Court in which the same is intended to be brought, shall be clearly and especially stated. And by the 12th section it is enacted that if, at the trial of any such action, the plaintiff shall not prove that such action was brought within the time before limited in that behalf, or that such notice as aforesaid was given one calendar month before such action was commenced, or if he shall not prove the cause of action stated in such notice, then and in every such case such plaintiff shall be nonsuited, or the jury shall give a verdict for the defendant. The notice is only necessary where the action is brought for an act done by the Justice in the execution of his office. In the present case, on the plaintiff's evidence it appeared that the act complained of was done by the defendant, sitting as Justice, with another Justice, at Petty Sessions, and on a charge made against the plaintiff, and before him on oath; *prima facie*, therefore, the plaintiff was acting as Justice; and though, in truth, he had no jurisdiction, or exceeded his jurisdiction in the matter, still that will not show that the act was not done in the execution of his office, so as to disentitle him to notice, provided the act was not colourable, and was done in a *bona fide* belief of his authority. This is established by the case of *Hazeldine v. Grove* (a); and it seems assumed as the law in the case of *Kirby v. Simpson* (b).

(a) 3 Q. B. 997.

(b) 10 Exch. 358.

In *Hazeldine v. Grove* (at p. 1006), Lord Denman lays down the law thus:—"The principle seems to be this, that where the "Magistrate, with some color of reason, and *bona fide*, believes that "he is acting in pursuance of his lawful authority, he is entitled to "protection, although he may proceed illegally, or exceed his jurisdiction. Whether he acts with such color of reason and *bona fide* "are questions for the jury, under all the circumstances, if there "be any evidence of them, and the plaintiff desires the opinion of "the jury to be taken, although it is very common to submit them "to the Judge first, as in the present case, on an application for a "nonsuit. And if the plaintiff does not desire the matter to be submitted to the jury he must abide by the decision of the Judge, if "the Court shall think it warranted by the evidence." In the case before us, the plaintiff did not submit to a nonsuit, and the case went to the jury, with the Judge's direction; but that direction would have been right on the assumption that the jury believed the evidence of the plaintiff; and as the Judge was not asked to leave to them any particular question as to *bona fides* or otherwise; then as the direction of the Judge was warranted by the only evidence before the jury, the verdict ought to stand, so far as its stability depends on the fact of the act complained of being done by the Justice in the execution of his office. We think the direction was warranted by the plaintiff's evidence. There was nothing to show malice, and though the defendant exceeded his jurisdiction, we think that, under all the circumstances of the case, there was evidence that the defendant believed he had jurisdiction, encountered by no evidence to the contrary; and we do not think there was illegality of such a palpable nature, nor such want of reasonable color or *bona fides*, as to disentitle the defendant to notice. But the main point insisted on before us was, that the want of notice was not available for the defendant to defend the action, unless specially relied on by plea. It will be seen that the provision of the 12 Vic., c. 16, which I have stated, requires in terms, that the action shall not be commenced until one month after notice given, and that if the plaintiff shall not prove, at the trial, that the notice was given, or shall not prove the cause of action stated in the notice, he shall be nonsuited,

E. T. 1860.
Eschequer.
LAWRENSON
v.
HILL.

E. T. 1860.
Eschequer.
 LAWRENSON
 v.
 HILL.

or the jury shall give a verdict for the plaintiff. These provisions seem to make the notice a part of the plaintiff's case, wholly independently of the pleading. However the argument of the plaintiff is, that the provisions are to be read in connection with other provisions of the statute. By the 10th section of the Act it is enacted, that in any such action, brought in any of the Superior Courts of Law, the venue shall be laid in the county where the act complained of is committed; and the defendant shall be allowed to plead the general issue there, and to give any special matter of defence, excuse or justification in evidence, under such plea, at the trial of such action. Reading the 12th section of the Act in connection with this, it is said that the meaning is that, on a plea which puts any matter of defence in issue, the onus of proving the notice shall be thrown on the plaintiff. The 10th section, which gives the plea of the general issue with this effect, is repealed by the Common Law Procedure Act 1853, and the general issue cannot now be pleaded in actions of the nature before us. By the 71st section of that Act, "In actions for wrongs, defence by way of "denial shall take issue on one or more than one material matter "of fact alleged in the summons and plaint; and all defences which "admit the matter complained of, but rely on matter of avoidance, "excuse or justification, shall be so expressly pleaded." If, therefore, the want of this notice be a defence of matter of avoidance, excuse or justification, it would seem that it ought now to be specially pleaded. Several authorities on statutes requiring notice as necessary to the plaintiff's recovery in actions were cited in support of the proposition that the want of such notice must be pleaded when a statutable general issue is not available. In none of them, however, did the statute in question require the proof by the plaintiff of the notice as necessary to avoid a nonsuit or a verdict against him. On the other hand, a series of authorities on what is called the Apothecaries Act in England, and which does contain a provision of that nature, and which does not give a statutable plea of the general issue, were relied on to show that a plea was not necessary. These authorities appear to have settled the law as to that Act, though not till after a considerable conflict of opinion. The cases

are, *Morgan v. Ruddock* (a), *Shearwood v. Hay*, and *Wills v. E. T. 1860.*
Langridge (b), and *Wagstaffs v. Sharpe* (c). The Apothecaries *Exchequer.*
 Act is 55 G. 3, c. 194, and the 21st section enacts, that no apothecary shall be allowed to recover any charges claimed by him, in any *LAWRENSON*
Court of Law, unless such apothecary shall prove, on the trial, that *v.*
 he was in practice as an apothecary prior to or on the 5th of August *HILL.*
 1815, or that he has obtained a certificate to practise as an apothecary from the Master, Wardens and Society of Apothecaries. I can see no substantial difference between this section and the 12th section of the Act before us, taken in connection with the 9th. The ground of the decision in the Apothecaries Act is thus stated by Lord Denman, in *Shearwood v. Hay* :—"The statute requires that, before any person shall be allowed to recover charges made by him as an apothecary, he shall prove that he was duly qualified. The Under-sheriff held that the qualification was a part of the plaintiff's title to recover, which the statute made it imperative upon him to prove. I think that the ruling was right." Now the doubt of the Court of Exchequer as to the law on the Apothecaries Act was, that the words of the Act of Parliament must be read with some qualifying words, such as that of the certificate being put in issue, and that, at the time the Act of Parliament was passed, everything which avoided the contract might be given in evidence under the general issue. The decisions, therefore, on that Act establish that the necessity of proving what the statute says the plaintiff shall prove is a necessity independent of the pleading in the action. And in subsequent cases in which the decisions on the Apothecaries Act were held not to apply to statutes enforcing the necessity of notice, this was laid down to be the true view, and the decisions on the Apothecaries Act were upheld, on the express provision that the plaintiff should prove. Thus in *Richards v. Easto* (d), in which the decisions on the Apothecaries Act were acted on, and held not to apply to the statute before the Court, Parke, B. (p. 252), says, "Unless the privileges are meant by that statute" (the statute then before him) "to be available to the defendant, and to be a good

(a) 4 Dowl. P. C. 311.

(b) 5 Ad. & Ell. 383.

(c) 3 M. & W. 521.

(d) 15 M. & W. 244.

E. T. 1860. "defence, *without pleading*, or independent of the form of the plea, *as*
Eschequer.
 LAWRENSON "the want of an apothecary's certificate has been held to be, the
 v. "defendant cannot avail himself of that defence, on a plea of not
 HILL. "guilty, which merely denies the fact of a trespass having been com-
 mitted." Again, in *Law v. Dodd (a)*, in which the decisions on the
 Apothecaries Act were cited for the same purpose, and held not to
 apply, Parke, B. (p. 849), says "The words of Act that" (the Apothe-
 caries Act), "are, that no apothecary shall be allowed to recover any
 charges unless he shall *prove*, at the trial, that he was in practice
 prior to the 5th of August 1815, or that he has obtained his certifi-
 cate. That means without reference to the defendant's plea." I can
 see no sound distinction between the words of the Apothecaries Act
 and the words of the statute before us. And though it be true that
 the Act before us gives the general issue a statutable effect, it
 did not make it obligatory on the defendant to plead the general
 issue, nor is the 12th section more dependent for its efficacy on his
 pleading it.

On the whole, therefore, we are of opinion that the delivery of
 the notice was a part of the plaintiff's title to recover in this case, and
 that it was necessary for him to prove it without reference to the
 defendant's plea. The cause, therefore, shown against the conditional
 order must be allowed, and the order discharged with costs.

J. E. Walsh applied for leave to appeal.

HUGHES, B.—Certainly. It is a very proper case for an appeal.

(a) 1 Exch. 845.

H. T. 1860.
Exch. Cham.

Exchequer Chamber.

FOOTT, in Error, v. HUDSON.*

(Error from the Court of Common Pleas.)

Jan. 16, 17.

THIS was a suggestion of error, by the defendant below, upon the award of *venire de novo* in this cause. The pleadings and special verdict are stated in vol. 9, pp. 203-4, and the judgment of the Court, pp. 207-13. The plaintiff below likewise suggested error, upon the ground that final judgment upon the special verdict ought to have been awarded in his favour.

Chatterton and *Exham*, for the plaintiff in error, contended that the defendant in error (plaintiff below) had no right to employ an unqualified servant to hunt game in his absence. They cited the various authorities referred to in the Court below. They also argued that the special verdict was defective in not containing a positive finding with respect to the property qualification of the plaintiff below, and that the Court had no authority to award a *venire de novo*, for the purpose of having that defect supplied, but were bound to enter a verdict for the plaintiff in error (defendant below). Upon the second point they cited *Mayor of Nottingham v. Lambert* (a); *Martin v. Jenkins* (b); *Witham v. Earl of Derby* (c); *Goodtitle v. Jones* (d); *Bentley v. Smith* (e); *Sanders Vanzeller* (f).

A party having a sufficient property qualification to kill game, where the lease, of which he holds the reversion, reserved "free liberty to the lessor, his heirs and assigns, his and their servants and followers, to hunt, hawk, fish and fowl upon the demised premises," is entitled to employ a servant, not possessing the property qualification required by the 10 W. 3, c. 8, s. 8, to kill and hunt game in his absence.

Held also, that where a special verdict is defective, in not finding a

material fact, but simply leaving it as a matter of inference, it is competent for the Court to award a *venire de novo*.

(a) Willes, 107.

(b) 2 Str. 1144.

(c) 1 Wils. 55.

(d) 7 T. R. 43-8.

(e) 3 Smith's Rep. 39.

(f) 4 Q. B. 260.

* *Coram* LEFROY, C. J., FROOT, C. B., O'BRIEN, J., GREENE, FITZGERALD and HUGHES, BB.

H. T. 1860. *Sullivan and Jellett*, contra, were not called upon as to the first
Exch. Cham. point. Upon the second they cited *Tancred v. Christy* (a).
FOOTT
v.
HUDSON. *Cur. ad. vult.*

Jan. 17. LEFROY, C. J., delivered the unanimous judgment of the Court, that the judgment of the Court of Common Pleas should be affirmed, adding, that it was the opinion of some of the Members of the Court that judgment ought to be entered up on the special verdict in favour of the plaintiff below ; but as his Counsel had expressed themselves satisfied to hold the judgment of *venire de novo*, that judgment should stand.

(a) 12 M. & W. 316.

T. T. 1860.
Common Pleas.

M'CONNELL v. M'KENNA.

(*Common Pleas.*)

June 1.

In an action for oral slander, the summons and plaint charged the defendant with having spoken certain defamatory words of the plaintiff, in his trade of flax-dealer. The defendant denied the speaking of the words, and in the sense imputed. The words alleged in the second count to have been uttered were, "He never knew M'Connell to have any dealings with any one that he did not rob, if he could." The cause was tried at the last Armagh Assizes, before MONAHAN, C. J., when a witness named Wynne deposed to a conversation with the defendant, in the course of which he alleged that plaintiff was "a blood-sucking, robbing old scoundrel, and that it was better for those who were dealing with him to have an end put to their existence;" which words the witness understood to mean that the plaintiff took all he could from the people who were dealing with him. The defendant further stated that the plaintiff had never made a penny honestly in the course of his life. Another witness (Patrick M'Gahan) deposed that defendant had, on that occasion, said of plaintiff, "the blood-sucking old rogue, any money he has was wrung from wretches he had dealings with." The plaintiff stated that he was in the habit of lending money to persons to buy flax, and getting from them one-third of the profits, bearing one-third of the loss, if any. The defendant denied having used the words, "that the plaintiff was a blood-sucking old rogue;" all that he said was, that the plaintiff had got upon a stand at a race-course without

In an action for oral slander, alleged to have been spoken of the plaintiff in his trade, the plaintiff's witnesses failed to prove the speaking of words sufficient to support the allegations of the summons and plaint; but a witness, called on the part of the defendant, admitted, on cross-examination, having, at the request of one of the plaintiff's witnesses, written an account of the words used by the defendant upon the occasion in question. The last-mentioned witness, upon re-examination, stated that the paper was the witness's own version of the transaction. The written statement having been admitted at the

trial, subject to objection, as evidence to sustain the charge— Held that, although admissible for the purpose of impeaching the credit of the writer, the document in question was no evidence of the facts therein stated, and ought not to have been submitted to the jury as such.

It is necessary, in actions of slander, for the plaintiff to prove the actual words alleged, or enough of them to sustain the action; and it will not be sufficient to prove the speaking of other words of similar meaning, and involving the same offence.

T. T. 1860.
Common Pleas.

M'CONNELL
v.

M'KENNA.

paying for a ticket. A witness named Mulligan was then examined on behalf of defendant, who stated that he was in M'Gahan's shop on the night in question; that they talked of the plaintiff not having paid for his place on the race-stand; they called each other liars. Defendant said that the plaintiff was a "poor suck;" that he oppressed the people under him having dealings with him; he called him an "old suck." On examination the witness stated that, after the occurrence took place, on the same evening, M'Gahan wrote a memorandum of what occurred, and that witness wrote the paper produced to him; but not as his own account of the transaction, but as M'Gahan had dictated to him. M'Gahan, having been recalled by the plaintiff, contradicted Mulligan, as to his having dictated to him; but stated that Mulligan wrote the produced paper as his own account of what occurred. His Lordship told the jury, on comparing the words stated in the plaint with the evidence, that the latter did not sustain the words stated in any count, but that the written statement made by Mulligan, if they believed it to be the true account of what occurred, would sustain the second count. His Lordship, accordingly, left the case to the jury on the second count, withdrawing from them the other parts of the plaint; but, though he was clearly of opinion that the statement written by Mulligan was properly received in evidence, he stated to the parties that he entertained very great doubts whether it was evidence to sustain a verdict, and not merely so to contradict Mulligan's account at the trial; and he reserved liberty for the defendant, in the event of there being a verdict against him, to move to have a verdict entered for him, if he should have so directed the jury. The jury found for the plaintiff, on the second count, £5 damages.

A conditional order having been obtained to enter a nonsuit or a verdict for defendant, pursuant to leave reserved—

Joy (with whom was *Hamill*) showed cause.

The evidence was admissible, being relevant to the issue. That distinguishes the case from *The Attorney-General v. Hitchcock* (a).

The observations of Pollock, C. B., in that case are in fact an authority in our favour. He says:—"If you ask a witness whether he has not said so and so, and the matter he is supposed to have said would, if he had said it, contradict any other part of his testimony, then you may call another witness to prove that he said so, in order that the jury may believe the account of the transaction which he gave to that other witness to be the truth, and that the statement he makes on oath in the witness-box is not true."—[CHRISTIAN, J. I can understand the force of that observation in a case where there was other evidence upon which the verdict might be rested.—MONAHAN, C. J. That might be evidence to show that the witness's present statement was not true.]—The plaintiff's case here does not solely rest on the contradiction. The words proved to have been uttered were to the same effect as those alleged: *De Saily v. Morgan (a)*; *Dingle v. Hare (b)*.

T. T. 1860.
Common Pleas.
M'CONNELL
v.
M'KENNA.

S. Ferguson and A. Henderson, contra.

If the witness had been the defendant himself, this would have been evidence against him; but it is merely the written statement of one witness to another, which, though admissible for the purpose of impeaching the credit of the writer, is no evidence of the facts stated in the document. Independently of this, there was no evidence to support the allegation in the summons and plaint. They cited *The Queen's case (c)*; *Melhuish v. Collier (d)*; *Rex v. Oldroyd (e)*; *Ewer v. Ambrose (f)*; *Wright v. Beckett (g)*.

Hamill, in reply, cited 2 *Phil. on Evidence*, p. 510; *Crowley v. Page (h)*; *Harrison v. Bevington (i)*.

MONAHAN, C. J.

In this case we entertain no doubt. The document in question

(a) 2 Esp. 691.

(b) 29 Law Jour., N. S., C. P., 143.

(c) 2 Bro. & Bing. 298.

(d) 15 Q. B., N. S., 878.

(e) Russ. & Ry. 88.

(f) 3 B. & C. 746.

(g) 1 M. & Rob. 414.

(h) 7 C. & P. 689.

(i) 8 Car. & P. 708.

T. T. 1860. *Common Pleas.* was proper evidence to take away the effect of the evidence given at the trial by Mulligan, the party who wrote it; but it was no evidence of the truth of the statements contained therein, so as to suffice to have a verdict founded thereon as original evidence. Then it is not sufficient that the words proved to have been uttered should have the same meaning, and involve the same offence, as those charged in the summons and plaint. But the plaintiff must prove the speaking of the actual words, or enough of them to sustain the complaint, and not merely words of similar meaning. Therefore, we are of opinion that there was no evidence at the trial to justify me in having allowed the case to go to the jury. We must, therefore, enter a nonsuit; but, as I was not called upon at the trial to nonsuit, we shall not give the defendant the costs of the present motion.

M'CLORY v. WRIGHT.

May 2, 7.

In an action for a penalty, brought under the Corrupt Practices Prevention Act 1854, s. 2, for offering a bribe to a voter, the only evidence against the defendant was the uncorroborated testimony of the plaintiff, who was the party sought to be bribed. The plaintiff admitted having entered into such a negotiation with the defendant as would have subjected himself to an action for a penalty, under section 3 of the same Act. It having been objected that the defendant could not be convicted upon the above evidence, in the absence of corroboration, inasmuch as the plaintiff was to be regarded in the light of an accomplice:—*Held*, that, assuming an analogy to exist between criminal cases and penal actions, there was no inflexible rule of law which rendered illegal a conviction obtained upon the uncorroborated testimony of an accomplice.

Held also, that no such analogy existed between criminal cases and actions for penalties, and that the case was rightly submitted to the jury, upon the sole evidence of the plaintiff.

when it appeared that the plaintiff was an elector of the borough of Newry; that prior to the last Newry election, the defendant met the plaintiff, for the purpose of canvassing him for his vote on behalf of one of the candidates, and offered him £40 for his vote, which the defendant declined, but expressed his readiness to vote for £10 in addition to the sum offered. It did not appear that the money was afterwards paid. The plaintiff was the only witness called to establish the facts stated in the summons and plaint, the only other witness upon the same side not having proved anything material. The plaintiff having closed his case, the defendant's Counsel did not call him to contradict the plaintiff's statement; and the LORD CHIEF JUSTICE thereupon told the jury that the question for them was, whether the defendant offered the money, as sworn by the plaintiff; that defendant's Counsel had insisted that the plaintiff, as having been a *particeps criminis*, was a witness whose testimony could not safely be relied on without corroboration, but that as to that, the jury should bear in mind that, if this were an indictable offence, the defendant could not have been examined as a witness for himself; but that it being merely an action for penalties he could be examined, and could deny the allegation on oath. Counsel for the defendant having, at the conclusion of the charge, called for a direction that the cause of action in the summons and plaint being one for which an indictment could also have lain, and the plaintiff being a *particeps criminis*, the jury could not safely act on his testimony, without some corroboration, his Lordship declined so to direct, and the jury found for the plaintiff.

E. T. 1860.
Common Pleas.
 M'CLORY
 v.
 WRIGHT.

A conditional order was afterwards obtained, to set aside the verdict, upon the ground of misdirection.

The *Solicitor-General* and *D. C. Heron* showed cause, and contended that, even assuming that, in criminal cases, a conviction obtained upon the uncorroborated testimony of an accomplice was illegal, no analogy existed between such cases and actions of a civil nature; secondly, that even in criminal cases, though it was the practice to warn juries against acting upon such unsupported testimony, they were at liberty to do so, if they thought proper; and

E. T. 1860. that the absence of such a caution would not vitiate the conviction. Also that, though the plaintiff might be liable to a penalty, under the 3rd section, he did not thereby become an accomplice, the offence being of a different character, and visited with a different penalty. They cited *Rex v. Durham* (a); *Rex v. Jones* (b); *Attwood's case* (c); *Rex v. Stubbs* (d); *Rex v. Sheehan* (e); *Taylor on Evidence*, 7th ed., p. 779; *Benfield v. Petrie* (f); *Spong v. Hogg* (g); *Harrison v. Harrison* (h); *Mead v. Robinson* (i); *Birch v. Raleigh* (k); *Heward v. Shipley* (l); *Rex v. Smith* (m); *Standen v. Edwards* (n).

Macdonogh and *H. Law*, contra, contended that, in criminal cases, if it were not a strict rule of law that the uncorroborated evidence of an accomplice could not be received, at all events that it was the duty of the Judge to caution the jury against acting thereon, and that the want of such a caution would vitiate the conviction; secondly, that penal actions stood on the same footing in this respect as felonies and misdemeanours. They cited 2 *Taylor on Evidence*, 7th ed., p. 796; *Rex v. Wilkes* (o); *Rex v. Farler* (p); *C. B. Joy on Accomplices*, p. 5; *Rex v. Barnard* (q); *Rex v. Noakes* (r); *Thurtell v. Beaumont* (s); *Davy v. Baker* (t); *Baker v. Rush* (u); *Hall v. Green* (v); *Lord Melville's case* (w).

Cur. ad. vult.

MONAHAN, C. J.

May 7. In this case I shall ask the other Members of the Court to express their opinions before I state mine.

(a) 1 Leach, C. C., 478.

(b) 2 Camp. 132.

(c) 2 Leach, C. C., 521.

(d) 7 Cox, C. C., 48; S. C., 1 Dearaley's C. C. 555.

(e) Jebb, C. C., 54.

(f) 1 Douglas, 24.

(g) 2 W. Bl. 802.

(h) 9 Price, 89.

(i) Willes, 422.

(k) Sayers, 289.

(l) 4 East, 180.

(m) 20 State Trials, 1226.

(n) 1 Ves. jun. 139.

(o) 7 C. & P. 237.

(p) 8 C. & P. 106.

(q) 1 C. & P. 88.

(r) 5 C. & P. 326.

(s) 8 B. Moo. 612.

(t) 4 Burr. 2472.

(u) 15 Q. B. 870.

(v) 9 Exch. 252.

(w) 29 State Trials, 549.

KROGH, J.

This was a motion for a new trial, upon the ground of the misdirection of the LORD CHIEF JUSTICE. The opinion of the CHIEF JUSTICE, upon this question, was stated by him, at the time of the application for a conditional order; but, inasmuch as it was to his charge that the objection was taken, he thought it right that an opportunity should be given for further discussion; and a conditional order was accordingly granted, upon the understanding that this was not, as in the case of a bill of exceptions, to be treated with the technical strictness of a question of misdirection or non-direction; but that if, in the exercise of a wise discretion, we considered that the charge was calculated to mislead the jury, there should be a new trial. This was an action brought by the plaintiff against the defendant, under the provisions of the 17 & 18 Vic., c. 102, called the Corrupt Practices Act, for the recovery of a penalty of £100. The Act is entitled "An Act to Consolidate and Amend the Laws relating to Bribery, Treating and Undue Influence at Elections of Members of Parliament;" and the preamble states that, "Whereas the laws now in force for preventing corrupt practices in the election of Members to serve in Parliament have been found insufficient; and whereas it is expedient to consolidate and amend such laws, and to make further provisions for securing the freedom of such elections." The 2nd section defines what persons shall be deemed to be guilty of bribery. The first class specified therein to be deemed guilty of bribery are such as shall "give, lend, or agree to give or lend, or shall offer, promise or promise to procure, or to endeavour to procure, any money or valuable, to or for any voter," &c. The 3rd section defines another class of persons as guilty of bribery, namely, "every voter who shall, before or during such election, directly or indirectly, by himself or by any other person on his behalf, receive, agree or contract for any money, gift, &c., for himself or for any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at any election." So that two classes of persons are included within the definition; first, those who offer bribes; secondly, those who receive them. Having thus defined what per-

E. T. 1860.

Common Pleas.

M'CLORY

v.

WRIGHT.

E. T. 1860.
Common Pleas.

M'CLORY
v.

WRIGHT.

sons should be deemed guilty of bribery, the 2nd section goes on to provide that "every such person shall be guilty of a misdemeanour, "and shall also be liable to forfeit the sum of £100 to any person "who shall sue for the same," &c. The only other provision of this Act of Parliament to which I need refer is the corresponding provision in the 3rd section, for a similar punishment upon the voter, except that the amount of the penalty recoverable is £10 instead of £100. Without feeling it necessary to go into a minute detail of the facts in the present case, I may merely state that, at the last general election for the borough of Newry, the defendant Wright came to the plaintiff, who was a voter, and offered him £40 for his vote; the latter was nothing loath to take a bribe, but alleged that the sum was too small, and asked £10 more. He was, at all events, not unwilling to negotiate with the defendant, and he afterwards applied for the money, and was ready to take it. This was enough to raise the question of law, inasmuch as the plaintiff, within the meaning of our criminal code, was an accomplice in the offence charged. The burthen of proof lay on the plaintiff; the only witness was the plaintiff himself. He deposed to the facts I have mentioned, and stated sufficient, if believed, to fix on Wright the offence of offering him a reward for his vote, and likewise to bring himself within the category of the 3rd section. No other witness was produced. The plaintiff closed his case, and the defendant's Counsel called on the CHIEF JUSTICE to direct the jury that the plaintiff's case had failed. The defendant was, all the time, in Court; the plaintiff had pointed him out to the jury, and said that he was the person who had made the offer. There was an opportunity for contradicting the evidence of the plaintiff, by that of the defendant and other witnesses. The CHIEF JUSTICE was called on to tell the jury that the plaintiff had failed to make out his case, because he was an accomplice; secondly, that he should advise the jury, in the exercise of their discretion, not to rely upon the evidence of the plaintiff, as in a criminal case, as being uncorroborated. The defendant's Counsel seek to establish two propositions: first, that in every criminal case, in order to justify the conviction of the accused, it is not sufficient to prove the

fact by the evidence of an accomplice, without a corroboration in the material facts; and, secondly, that as this was an action for penalties, in which the party sued might, upon proof of the same facts, be convicted of a misdemeanour, that the same strictness of proof was required as in a criminal prosecution, and that the rules in criminal cases were extended to cases of this kind. Both of these positions were put too strongly. I shall first proceed to examine the degree of corroboration required in criminal cases. *Taylor on Evidence* has been referred to, where the law on this subject is fully stated, and I quite concur in all the propositions there laid down (pp. 778-9):—"It remains only to mention the case of accomplices, "who are usually interested and always infamous witnesses, and "whose testimony is admitted from necessity, it being often impossible, without having recourse to such evidence, to bring the "principal offenders to justice. The *degree of credit* which ought "to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been "said that they ought not to believe him, unless his testimony is "corroborated by other evidence; and, without doubt, great caution "in weighing such testimony is dictated by prudence and reason. "But no positive rule of law exists on the subject; and the jury "may, if they please, act upon the evidence of the accomplice, even "in a capital case, without any confirmation of his statement. It "is true that Judges, in their discretion, will advise a jury not to "convict a prisoner upon the testimony of an accomplice alone, "and without corroboration; and the practice of giving such advice "is now so general that its omission would be deemed a neglect of "duty on the part of the Judge." He further says (p. 780):—"This doctrine has been well explained by the late Lord Abinger: " "It is a practice which deserves all the reverence of the law, that " "Judges have uniformly told juries that they ought not to pay any " "respect to the testimony of an accomplice, unless the accomplice " "is corroborated in some material circumstances. Now, in my " "opinion, that corroboration ought to consist in some circumstances which affect the identity of the accused."

E. T. 1860.
Common Pleas.
 M'CLORY
 v.
 WRIGHT.

There are two leading cases on this subject, one in Ireland

E. T. 1860. and the other in England. In *Rex v. Sheehan* (a), it was
Common Pleas. held unanimously, by eleven Judges, that the testimony of an
 accomplice, although uncorroborated, is evidence to go to a jury;
 M'CLORY v. that a conviction upon such evidence is legal, and that there can
 WRIGHT. be no general rule as to the cautionary direction to be given to the
 jury respecting his evidence. But it was also held, by six of
 the Judges to five, that the jury should, in the generality of cases,
 be told that it was the practice to disregard the accomplice's
 testimony, unless there was some corroboration; and that a cor-
 roborator, as to the circumstances of the case merely, and not
 as to the person charged, is deserving of very slight consideration.
 I quote this case for the first part of the decision. I subscribe
 to the words of Lord Abinger, that the corroboration should go
 not only to the circumstances but to the identity; but there it is
 laid down that a jury *may* convict upon the uncorroborated tes-
 timony of an accomplice. In *Regina v. Stubbs* (b), Jervis, C. J.,
 says:—"In point of law, the Judge is bound to tell the jury that
 "they may find a verdict of guilty, upon the uncorroborated
 "testimony of an accomplice, but the usual course is to advise
 "them not to do so." Parke, B.—"I have uniformly directed the
 "jury, in respect of the unsupported testimony of an accomplice, in
 "the manner pointed out by the Lord Chief Justice." Wight-
 man, J., made observations to the same effect, and Willes, J.—
 "The question reserved in this case is one of practice only, and
 not one of law." So much for the general question, as to the
 necessity of corroboration. But then, with respect to the second pro-
 position, Counsel say that, following the supposed analogy, the
 evidence should have been as strong, in order to justify the jury
 to find for the plaintiff, as if the defendant had been indicted for
 a criminal offence. That analogy appears to me to be overstrained.
 In 2 *Taylor on Evidence*, p. 779, it is said:—"It has been stated
 "that this practice is not applicable to cases of misdemeanour;
 "but there appears to me no foundation, either in reason or law,
 "for the distinction between misdemeanours and felonies; and, in
 "fact, the distinction, if it ever existed, no longer prevails. The

(a) Jebb, C. C., 44.

(b) 7 Cox, C. C., 48.

"extent of corroboration will, of course, depend much upon the
 "nature of the crime and the degree of moral guilt attached to
 "its commission; and if the offence be of a purely legal character,
 "as, for instance, the non-repair of a highway, or if it imply no
 "great moral delinquency, as the fact of having been present at
 "a prize fight, which unfortunately terminated in manslaughter, the
 "parties concerned in it, though, in the eye of the law, criminal,
 "will not be considered such accomplices as to render necessary any
 "corroboration of their evidence."

E. T. 1860.
Common Pleas.
M'CLORY
 v.
 WRIGHT.

I take it that the case we have to deal with here does not require even that the proposition should be carried as far as has been laid down by Mr. *Taylor*; namely, that parties guilty, in the eye of the law, of a criminal offence, but not involving any serious moral delinquency, should not be deemed as coming within the rule regarding accomplices. The object of the Legislature, in the passing of this Act, was to extend the remedies already in force against corrupt practices; and one mode resorted to was to enable any person to sue any party guilty of bribery, for a penalty of £100. Is it to be held that the same degree of corroboration is required in this case, in fact that any corroboration at all is required? Suppose that two parties were charged with a common assault, and that one came forward to prove against the other, could it be said that the same amount of corroboration was necessary as in a case of felony? Is this case anything like even that? Is this, in fact, a criminal prosecution? This sort of action would, in fact, be perfectly useless, if it could not be maintained without a corroboration. If so, what would become of ninety-nine out of one hundred of such cases? In most cases such transactions are confined to two parties, the briber and the bribed. If corroboration were required, it would defeat the object of the Legislature. There is an important distinction between this and a criminal trial; namely, that the parties to the suit here are capable of giving evidence; the plaintiff and the defendant can both be examined. Here the defendant was actually in Court, and during the entire of his evidence the defendant was appealing to him, as the person who had committed the acts charged. Was it, in fact, no corroboration of the evidence, that

E. T. 1860.
Common Pleas.

M'CLEERY
v.

WRIGHT.

one party should depose to facts, as having occurred in the presence of the other party, and that the latter should not contradict him? Would it not be evidence against a party, to prove that a statement was made in his presence, and that he remained silent? Suppose, for example, an action for a libel, charging the commission of a criminal offence, and that the defendant justified, and said that the offence had been committed; suppose that the proof consisted of the testimony of an accomplice, without any corroboration, would it not be held that the action was maintainable? The recent Evidence Act introduced a new state of things, since it allowed the examination of the parties themselves. The defendant, though pointed at by the plaintiff, in open Court, does not venture to get into the box. I think that that was a corroboration in itself, and that it was enough to induce the jury to place confidence in the plaintiff's testimony. I am, therefore, of opinion that there was neither any misdirection nor omission, on the part of the LORD CHIEF JUSTICE; and further that, even had a corroboration been required, that such virtually existed. For these reasons, I am of opinion that the verdict in favour of the plaintiff ought not to be disturbed.

CHRISTIAN, J.

I am entirely of the same opinion, and can add but little to what has been said by my Brother KEOGH.

It has been argued that, because the facts which are necessary to sustain an action of this kind would be sufficient to support a criminal prosecution, so that the plaintiff can only recover the penalty by proving that the defendant has been guilty of a crime, therefore, all the rules of practice and of evidence which would be observed upon the criminal trial must be applied to the trial of this action. Now without stopping to dwell upon the obvious differences, both moral and material, which weaken the analogy between those two forms of proceeding—the one, a civil action, brought by a subject, which can result only in the recovery of a defined sum of money—the other, a prosecution in the name of the Crown, an adverse result of which would at once place the accused, in the eye of the

law, and of society, in the category of criminals, and subject him to imprisonment and fine at the discretion of the Court—without dwelling further upon these generic differences, there are two particular distinctions which, to my mind, render it impossible to import from the criminal to the civil trial the rule of evidence, or rather of practice, regarding the corroboration of accomplices. The first is this; the judgment in the action would constitute no defence to the plaintiff against a similar action or a prosecution against himself for the same offence. The Corrupt Practices Prevention Act contains no clause such as is found in some of the earlier Bribery Acts, by which impunity is conferred upon the first discoverer. All that is done in that way, by this Act, is that the 35th section provides that evidence given by the parties on the trial of an action for penalties shall not afterwards be used in any indictment or criminal proceedings under this Act, against the party giving it. But it leaves him exposed to the indictment if other evidence can be obtained, and exposed even to have his own evidence used against him on the trial of a civil action. But what is the principle upon which in criminal cases it is usual to require that accomplices shall be corroborated? It is because, as Mr. *Taylor* expresses it, they are usually interested and always infamous witnesses. Guilty themselves, they come to purchase impunity by tendering their evidence against their confederates. Now how can you apply a practice which is founded on these reasons to a proceeding in which the evidence of the witness not only affords him no protection against future proceedings, either criminal or civil, but may be made use of against him in one of those forms of proceeding? The other distinction to which I have adverted is that which my Brother *Клоон* has already pointed out, that in the action for the penalty, as distinguished from the prosecution for the crime, the legal incidents of the proceeding supply the corroboration which is said to be necessary, not merely by the general Evidence Act, but specifically by the 35th section of the Corrupt Practices Act itself. On the trial of an action for a penalty, the parties are rendered competent witnesses. If then the defendant, sitting by when the plaintiff proves the case against him, abstains

E. T. 1860.
Common Pleas.

M'CLORY
v.
WRIGHT.

E. T. 1860.
Common Pleas.

M'CLORY
v.

WRIGHT.

deliberately from coming forward to contradict him, surely that is some corroboration of the plaintiff's story. Mind I do not say that it is conclusive of his guilt. I can well understand how, as was pressed in argument, there might be circumstances which would account for such conduct, without warranting that conclusion; but that is for the jury: and all I say is, that the defendant's silence is some corroboration of the plaintiff's statement. Suppose the LORD CHIEF JUSTICE had yielded to the argument of the defendant's Counsel, and had told the jury, "Gentlemen, the rules of evidence are the same in civil and criminal cases; the plaintiff here is in the nature of an accomplice, and I tell you that, though a verdict founded on his evidence alone, if you believe him, would be a legal verdict, yet it is a verdict which you ought not to give, unless you find him corroborated," would the CHIEF JUSTICE be doing his duty if he did not add, "but I am bound to tell you that, by the law of evidence, the defendant was a competent witness on his own behalf, and his holding back is a circumstance to be taken into your consideration, as to whether it does not afford corroboration of the plaintiff's evidence?" Suppose, upon the trial of this case, or suppose, upon the trial of an indictment for the bribery, the plaintiff, after proving the case himself, had called a witness who proved that he was present on a certain occasion with the plaintiff and the defendant, when the former charged the latter with the offence, exactly as he had just deposed to, and the defendant sat silent, would not that, even in a criminal case, be corroboration sufficient to satisfy the rule, and if it would, is not his silence on the very trial itself, when he was entitled to be heard on his own behalf, at least as efficacious? These two points of difference alone, first, that the success of the action will confer no personal immunity (or hold out any hope of it) on the plaintiff; secondly, that he is a competent witness for himself, and declines to be examined, are to my mind amply sufficient to show that there is no analogy in this respect between the two proceedings. But suppose all this were wrong, suppose the analogy to exist in the utmost strictness, what is it, and what would be its effect upon the present motion? It is perfectly settled now that the rule is a rule of practice, and not of evidence; a

practice which, though as Lord Abinger observed (*a*), deserves all the reverence of law, does not possess the obligation of law. Accordingly, if a conviction be had upon the sole evidence of an accomplice, uncorroborated, and without a word of caution from the Judge, the conviction is perfectly legal, and a Court of Criminal Appeal cannot meddle with it or with the judgment upon it. *Stubbs' case* (*b*) is decisive as to that. Well, the conditional order in this case is for misdirection of the learned Judge, misdirection consisting in the omission to give the caution. But *Stubbs' case* shows that, even in a criminal case, that would not be misdirection. How then can it be so in a civil case? I could quite understand this, if the conditional order had been granted upon the ground of the verdict being against the weight of evidence, and the learned Judge had reported to us that he was not satisfied with the verdict, that then, seeing that the only evidence was that of the plaintiff, if we thought that the rule as to *participes criminis* was the same in civil as in criminal cases, we might consider that the disregard of this rule at the trial, though not constituting an objection in point of law, yet might materially affect our discretion as to granting a new trial. But the learned Judge tells us he is highly satisfied with the verdict, that he has not a doubt it is agreeable to truth and to justice, and the conditional order has been granted solely on the ground of misdirection in law. How can we, in the face of *Stubbs' case*, hold that there is misdirection in law? Why set aside a verdict which is agreeable to justice, founded on legal evidence, and obtained on a trial where there has been no miscarriage in fact by the jury, or in law by the Judge? Therefore, even if we adopted the analogy for which the defendant contends, I cannot see how it would enable us to make absolute this conditional order. But, as I have said already, I do not think the analogy exists at all; and, for these reasons, I am of opinion that the cause shown must be allowed.

E. T. 1860.
Common Pleas.
 M'CLORY
 v.
 WRIGHT.

MONAHAN, C. J.

I am authorised by Mr. Justice BALL, who heard the argument,

(a) 8 C. & P. 107.

(b) 1 Dearsly, 555-7; S. C., 7 Cox, 48.

E. T. 1860. to say that he agrees with the rest of the Court. As the point discussed was an objection to a charge of mine, I was anxious that the other Members of the Court should first express their opinions, and I may say that I fully concur with the judgments they have delivered.

Common Pleas.

M'CLORY

v.

WRIGHT.

Cause shown allowed.

SCULLIN v. M'NAGHTEN.

April 18.

May 8.

A lease *pur autre vie* contained a clause that, "if the *cestui que vies*, or either of them, should be absent from Ireland for three whole years at one time, such life, in respect to the continuance of this demise, shall be considered as if actually dead from the end of such three years." It then provided that at any trial at Law, or hearing in Equity, at the suit of the landlord, concerning the premises, "it shall be incumbent on the defendant to prove the *cestui que vies* or the survivor in being, and that they or he then or within three years next preceding the commencement of such action or suit, was actually in Ireland, or, in default of such proof, this lease shall be determined to be, and shall be, *ipso facto*, void," &c. In 1847, one of the *cestui que vies* died, the other one had left Ireland in 1845; and after he had been absent for more than three years, an ejectment on the title was brought, and the premises were evicted, judgment having gone by default. After a lapse of several years, the plaintiffs, who were defendants in the former ejectment, brought a cross ejectment, and proved at the trial that the surviving *cestui que vie* was alive at the time of the former action; that he had since returned to Ireland, and had only recently gone back to America.—*Held* that, inasmuch as under the clause in the lease it was incumbent on the tenant to have proved, in the former suit, that the *cestui que vie* was then in Ireland, by the omission to do so the lease had conclusively determined, and could not be set up by giving such proof in the present action.

Knox, for and during the natural life and lives of the several persons named in the margin thereof, and the survivor of them; and from and after his decease, for and during so much and such part of the term of nine years, commencing and to be computed from the 1st day of November then last past, as should be then to come and unexpired, subject to the payment, &c. The memorandum was as follows:—"Mem. That the person and persons referred hereto by the indenture of lease, or *cestui que vie* therein, are "John Knox, aged about thirty-two years, and Hugh Knox, aged "about twenty-eight years, being two of the said lives therein mentioned." The lease contained the following special clause, "That if "the aforesaid John Knox and Hugh Knox, or *cestui que vies* in "the margin of this lease named, shall be absent from Ireland for "the space of three whole years at one time, the said life or *cestui que vie* shall, in respect to the continuance of this demise, be considered as if actually dead, from the end of such three years next "after the said John Knox and Hugh Knox shall so depart out of "Ireland; and upon any trial at Law or hearing in Equity, concerning the premises, in which the said Lord Mark Robert Kerr "and Lady Charlotte Kerr and their assigns, or the person or persons "who shall for the time being be entitled as aforesaid respectively, "shall be plaintiff or lessor of the plaintiff, it shall be incumbent on "the defendant to prove that the said John Knox and Hugh Knox, "or the survivor of them, then, or within three years next preceding "the commencement of such action or suit, was actually in Ireland; or "in default of such proof, this lease shall be determined, and the plaintiff shall be entitled to recover possession of the said demised premises, "with full costs of suit, notwithstanding it should thereafter appear that "the said John Knox and Hugh Knox, and the survivor of them, was "still in being, anything herein contained to the contrary in anywise notwithstanding." The lessee's interest subsequently became vested in the plaintiffs, that of the lessors having likewise devolved upon the defendant. In 1847, John Knox, one of the *cestui que vies* in the lease, died, the other *cestui que vie*, Hugh Knox, having in 1845 emigrated to America. The defendant brought an ejectment as of Easter Term 1848, against the plaintiffs, for recovery of the pos-

E. T. 1860.
Common Pleas.
 SCULLIN
 v.
 M'NAGHTEN.

E. T. 1860. session of the lands. The present plaintiffs took defence, but, by a
Common Pleas. fatality, judgment was suffered to go against them by default, and the
 SCULLIN defendant entered into possession under a writ of *habere*. In 1858,
 v. M'NAGHTEN. Hugh Knox returned to Ireland, and shortly afterwards the plain-
 tiffs commenced the present action. His Lordship left the question
 to the jury, whether Hugh Knox, the *cestui que vie*, had, at the time
 of the bringing of the ejectment in 1848, been absent from Ireland
 for three years, telling them that if they found that the fact were
 so, the verdict ought to be for the defendant. Counsel for the plain-
 tiffs objected to this direction, and called upon the LORD CHIEF
 JUSTICE to direct a verdict for the plaintiffs, on the ground that
 Hugh Knox was alive at the time of the bringing of the former
 ejectment; which his Lordship refused to do, and a verdict was
 accordingly found for the defendant.

Kernan (with whom was *A. Close*) now moved for a conditional
 order to set aside the verdict, on the ground of misdirection, con-
 tending that the proof which had been given at the late trial, that
 Hugh Knox was alive at the time of bringing the former ejectment,
 set up the lease which had been *prima facie* avoided by letting judg-
 ment go by default in the former suit.

Cur. ad. vult.

MONAHAN, C. J.

May 8.

This case comes before the Court upon an application for a con-
 ditional order, pursuant to leave reserved at the trial, to have the
 verdict directed for the defendant changed into one for the plaintiff.
 As the question altogether turns upon the construction of a written
 instrument, we thought it better to consider the question at this
 preliminary stage, than, by granting a conditional order, to put the
 parties to the expense of an argument on the subject. We have
 given to the case as much attention as if it had come before us in
 the latter way, and inasmuch as we are of opinion that, if we granted
 the conditional order, we should refuse to make it absolute, we
 have thought it better not to grant it. The case of the plaintiff, at
 the trial, was as follows:—John and Hugh Knox were seised, under

a lease dated the 2nd of January 1815, of the lands of Ballytubbert, which included the premises in question, for the lives of the two leasees, John and Hugh Knox. It appeared clearly, by the evidence of the plaintiff, that previous to the year 1847 he was assignee of and in possession of a portion of the demised premises; also that one of the *cestui que vie* in the lease was in this country in May 1858, and from thence to early in 1859, and there was no reason to suppose that he is not still alive. In answer to this case the defendant proved that, previous to 1848, he became assignee of the landlord's interest, and, in the year 1848, he brought an ejectment to recover possession of these premises, as on the determination of the lease, that he recovered judgment in that ejectment, and that, having executed the *habere*, the plaintiff had no right now to recover the premises in the present ejectment. This must depend upon the construction of the lease of 1815. The *habendum* is in the ordinary form, "To have and to hold all and singular the said demised premises, with the appurtenances (except, &c.), unto the said Robert Dyatt, John Knox and Hugh Knox, their heirs, &c., for and during the natural life and lives of the several persons named in the margin hereof, &c., and the survivor of them." The *cestui que vie* so named were John Knox and Hugh Knox.

E. T. 1860.
Common Pleas.
 SCULLIN
 v.
 M'KAGHTEN.

In a subsequent part of the lease there follows a proviso in these words:—"Provided always, and these presents are upon this express condition, that if the aforesaid John Knox or Hugh Knox, or *cestui que vie* in the margin of this lease named, or the survivor of them, shall be absent from Ireland for the space of three whole years at one time, the said life or *cestui que vie* shall, in respect to the continuance of this demise, be considered as if actually dead from the end of such three years next after the said John Knox and Hugh Knox shall so depart out of Ireland; and upon any trial at Law, or hearing in Equity, concerning the premises in which the said Lord Mark B. Kerr and Lady C. Kerr, and their assigns, or the person or persons who shall, for the time being, be entitled as aforesaid respectively, shall be plaintiff, or lessors of the plaintiff, it shall be incumbent on the defendant to prove the said John Knox and Hugh Knox, or the survivor

E. T. 1860. " of them, in being, and that the said John Knox and Hugh Knox, or
Common Pleas. " the survivor of them, *then, or* within three years next preceding the
 SCULLIN " commencement of such action or suit, was actually in Ireland; or
 v. M'NAGHTEN. " in default of such proof this lease shall be determined to be,
 " and shall be, *ipso facto*, void, and the plaintiff shall be entitled to
 " recover possession of said demised premises, with full costs of
 " suit, notwithstanding it should thereafter appear that the said
 " John Knox and Hugh Knox, and the survivor of them, was still
 " in being, anything therein contained to the contrary in anywise
 " notwithstanding"

It appeared at the trial before me that, in December 1847, John Knox, one of the *cestui que vies*, died; that Hugh Knox, the other *cestui que vie*, had left Ireland and gone to America in the year 1823 or 1824, and did not return to Ireland till the year 1858. An ejectment on the title was brought by the present defendant, soon after the death of the *cestui que vie*, John Knox. There appeared to have been no actual service of the ejectment on the plaintiff Scullin, but only on his wife. Scullin took defence to that ejectment on the 8th of June; judgment was marked on the 10th of June, no notice having been taken of the defence filed by the plaintiff. The defendant shortly after executed his *habere*, and has since continued in possession of the premises; and the question now is, whether the former tenant, by showing, as he has done, the existence of the life, is entitled to recover possession of the farm? That altogether depends upon the construction of the proviso. If that had stopped at the first clause, the point would not be arguable, for then the absence of the *cestui que vie* out of Ireland for three years would be conclusive evidence of his actual death. No doubt, in that case, the legal construction would be that though, at its commencement, the lease purported to be for the lives of two *cestui que vies*, and the survivor of them, yet that it was made subject to an express clause determining the lease, if these persons, or the survivor, left Ireland, and continued absent for a period of three years. The question is, what is the effect of the latter portion of the clause? I considered, at the trial, that the construction of the subsequent portion of the clause was not to affect the operation of the earlier part, but merely

to regulate on whom the onus of proof should be thrown ; and that the words "*then, or*" are introduced by some mistake, and do not alter the effect of the clause. I thought the meaning of the latter clause was, that the lease being determinable by the absence of the *cestui que vie* for three years next before a trial at Law, or hearing in a Court of Equity, it should be incumbent on the defendant in the action or suit to prove that the survivor was then in being, and that he was actually in Ireland, within the last three years ; else such lease should be void. If the words "*then, or*" were not in the lease, that would be the necessary construction of the clause. The introduction of these words certainly throws some doubt upon the matter ; and the true construction of the entire clause may possibly be that, if the *cestui que vie* was absent more than three years before the bringing of the ejectment, that after that had been brought, in case the tenant were able to prove that the *cestui que vie* was then in Ireland, and had returned immediately before, or even since, the commencement of the suit, he might have a valid defence to the ejectment, and that the construction of the first clause is not to render the lease null and void by reason of the absence of the lives, but that such absence is to be evidence of the life having died, unless the defendant in the ejectment should prove at the trial that the *cestui que vie* was not absent for the previous three years. But whichever of these two constructions be held to be the correct one, we think that the clause must receive either one or the other of them, and that, either way, inasmuch as the landlord brought his ejectment, and got judgment, and no proceedings were then taken to have a trial, and the life had been out of the country for upwards of ten years, this lease has determined, and the plaintiff cannot now maintain the present ejectment, merely by showing that the *cestui que vie*, within the last eighteen months, returned to Ireland. I may, however, observe that, if the parties desire to carry this case forward to the Court of Appeal, our decision will not prevent their so doing.

Conditional order refused.

E. T. 1860.
Common Pleas.
SCULLIN
v.
M'NAGHTEN.

1859.
Reg. Appeal.

Cychequer Chamber.

[REGISTRY APPEALS.]

FOSTER, *Appellant* ; MULHALL, *Respondent*.*

Dec. 9.

In order to be entitled to register under the proviso at the end of section 14, 13 and 14 *Vic.*, c. 69, the claimant must have a right to the premises by virtue of his appointment to the benefice.

Quere—Is the office of Wesleyan minister "a benefice," within the meaning of this proviso?

THE following case was stated by the Revising Barrister for the borough of Carlow:—

The name of John Foster appeared on the list of claimants No. 11, claiming to be registered as a voter in the borough of Carlow, as a rated occupier, for the following premises, house, offices and garden, of the rated net annual value of £12, in Brown-street. It appeared that Mr. Foster was a Wesleyan clergyman, and that, being appointed to a cure or office as such clergyman in the town of Carlow (an office which he still holds), he was placed in occupation of the house and offices in question. He was not rated as an occupier of the said house and offices; but he had claimed to be rated in respect of them on the 4th day of August 1859. Neither was he in possession or occupation previous to the 20th of July 1859, although he was in occupation on the said last-mentioned day; but it was proved that his predecessor in office, the Rev. John Nelson, occupied the same house and premises during the time he officiated as Wesleyan minister in the town of Carlow; and that Mr. Foster was put in possession of them by the trustees of the Wesleyan Society, upon Mr. Nelson's departure, and that Mr. Nelson had been rated as occupier of them, and that he appeared on the former registry in respect of the same premises; and, further, that Mr. Nelson had been put in possession of the same premises upon the departure of his predecessor in office, the Rev. Robert Banks, by whom, in like manner, they had been occupied, while he was the officiating Wesleyan minister in Carlow, and who had also been rated as occupier, and duly registered in respect of them.

It was further proved that Mr. Foster had ceased to occupy the

* *Coram* GREENE, B., CHRISTIAN, O'BRIEN and HAYES, JJ., and HUGHES, B.

said premises, as they had become dilapidated, and that, by the directions of the trustees of the Wesleyan Society, he had surrendered them to the landlord, and that he was in another house, to which he had removed in August 1859. Upon this evidence I rejected his claim, although it was contended before me that the house and premises in question came to Mr. Foster by succession or promotion to his office of Wesleyan minister, within the period of twelve months previous to July 1859,

1859.
Reg. Appeal.
FOSTER
v.
MULHALL.

The questions for the consideration of the Court are, whether lands, tenements or hereditaments, can be held to come to any person by succession or promotion to any benefice or office, within the meaning of the 14th section of 13 & 14 *Vic.*, c. 69, which such person is at liberty to abandon permanently while in the enjoyment of such benefice or office? and, if so, whether the words "benefice or office" in the said section are applicable to the position and office of a Wesleyan minister? If these questions be both answered in the affirmative, Mr. Foster's name is to be retained on the list of voters; if they be not, it is to remain struck off.

THOMAS RICE HENN.

Kaye (with him *Andrews*), for the appellant, cited the *Case of The Rev. William Ashley*, reported in *Delane's Decisions*, p. 357, and *Elliott on Elections*, p. 25, to show that the office of Wesleyan minister was held to be "a benefice," within the meaning of the analogous English Act.—[CHRISTIAN, J. One question in the case is, did these premises come to this gentleman by reason of his promotion? It appears, on the face of the case reserved, that, as a consequence of his promotion, certain trustees put him into the occupation of them, and that the premises were recoverable from him at any moment the trustees might wish to have them. The case in *Delane* is merely that of a freehold estate which had been for years appropriated to the office. The difficulty I have in the present case is, that the mere promotion to the office did not bring with it the right to these premises.]—In *Meyler's case* the facts were similar to these, and the claimant was held entitled to the franchise.

1859.
Reg. Appeal.

Cychequer Chamber.

[REGISTRY APPEALS]

FOSTER, Appellant; MULHA

Dec. 9.

In order to be entitled to register under the proviso at the end of section 14, 13 and 14 Vic., c. 69, the claimant must have a right to the premises by virtue of his appointment to the benefice.

Quere—Is the office of Wesleyan minister "a benefice," within the meaning of this proviso?

The following case was stated by the borough of Carlow:—

The name of John Foster app No. 11, claiming to be register

Carlow, as a rated occupier, for and garden, of the rated net

It appeared that Mr. Foster being appointed to a cure of

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of the promotion or succession. The

show that certain trustees put this gentleman

premises, not that they are his as of right,

to the office of Wesleyan minister, but

were, provided him with a residence. We are

in the absence of the learned Judge, this judgment has not
the approval.—*Exp.*

claim has not been established in this case,
not come to the claimant by virtue of

1859.
Reg. Appeal.
FOSTER
v.
MULHALL.

ion.

Dec. 13.

Court Appellant claimed to vote in respect of the occupation of house No. 20 N.-street, in immediate succession from house No. 6 N.-street, for twelve months on and previous to the 20th of July 1859. He had been on the previous registry in respect of No. 6, and came into occupation of No. 20 in May 1859. No. 20 was rated in the rate struck in September 1858, then being in the occupation of P. M., who let part of it to appellant. In the rate struck 20th of August 1859, appellant was rated in respect of No. 20—*Held*, that the latter rate-book

of claimants
the 5th of Octo-
on the list of electors
00, in respect of the occu-
Upper North-street, held in
se held at No. 6 Upper North-
ry, and occupied for twelve months
th of July 1859. Appellant was duly
Carlisle. The claim, as it appeared in list
words following:—

	Place of abode.	Nature of qualification.	Description of Premises.
Black Morke	Upper North- street	Rated occupier of house and tene- ments, No. 6 Up- per North-street, rated at £16, and of house No. 20 Upper North-street rated at £30.	House, situate at No. 20 Upper North-street, held in imme- diate succession from house situate at No. 6 Upper North- street, in the borough of New- ry, and occupied for twelve months on and previous to the 20th of July 1859.

The said appellant had been tenant of the house No. 6 Upper

could not be received in evidence, and that appellant was bound to show that on the
20th of July 1859 he occupied premises then separately rated.—Vote disallowed.

1859.
Reg. Appeal.

FOSTER
v.

MULHALL.

Andrews, on the same side, cited 2 & 3 *W.* 4, c. 88, s. 13.

GREENE, B.*

In this case, two questions have been submitted by the Revising Barrister for the consideration of this Court; first, whether this tenement has come to the appellant by succession or promotion? and, secondly, whether this possession of the appellant is the possession of a person holding an office within the meaning of the Act of Parliament? Upon the second of these questions we do not offer any opinion, because, even assuming that this may be considered as "an office," within the meaning of section 14, the facts submitted to us do not show that the appellant came into possession of this tenement by succession or promotion. The question simply is, whether the appellant comes within the exception at the end of section 14:—"Provided always, that when any lands, tenements or hereditaments, which would otherwise entitle the holder, owner or possessor thereof to vote in any such election, shall come to any person at any time within such respective periods of six or twelve calendar months, by descent, succession, marriage, marriage settlement, devise, bequest, or promotion to any benefice or office, such person shall, in respect thereof, be entitled to be registered as a voter in the register then next to be made under this Act." That is to say, there are several kinds of title adverted to, which do away with the necessity for inhabitation; and one of these is "promotion to any benefice." The question then is, what is the meaning of the word "promotion?" We are all of opinion that the meaning of the Legislature is, that the tenements shall belong to the person claiming his franchise, by virtue of the promotion or succession. The facts in this case only show that certain trustees put this gentleman into possession of these premises, not that they are his as of right, by virtue of his promotion to the office of Wesleyan minister, but that the trustees, as it were, provided him with a residence. We are

* NOTE.—Owing to the absence of the learned Judge, this judgment has not been submitted for his approval.—R.E.P.

all of opinion that the claim has not been established in this case, because the premises have not come to the claimant by virtue of his appointment.

Per Curiam.—Affirm the decision.

1859.
Reg. Appeal.
FOSTER
v.
MULHALL.

O'RORKE, *Appellant*; CARLISLE, *Respondent*.

Dec. 13.

THE following case was submitted for the consideration of the Court by the Revising Barrister for the borough of Newry:—

Patrick O'Rorke, the appellant, appeared on the list of claimants for the borough of Newry, at the revision held on the 5th of October 1859, claiming to have his name inserted on the list of electors for that borough for the years 1859 and 1860, in respect of the occupation of a house situate at No. 20 Upper North-street, held in immediate succession from a house held at No. 6 Upper North-street, in the borough of Newry, and occupied for twelve months on and previous to the 20th of July 1859. Appellant was duly objected to by John Carlisle. The claim, as it appeared in list No. 11, was in the words following:—

Name.	Place of abode.	Nature of qualification.	Description of Premises.
Patrick O'Rorke	Upper North-street	Rated occupier of house and tenements, No. 6 Upper North-street, rated at £18, and of house No. 20 Upper North-street rated at £30.	House, situate at No. 20 Upper North-street, held in immediate succession from house situate at No. 6 Upper North-street, in the borough of Newry, and occupied for twelve months on and previous to the 20th of July 1859.

The said appellant had been tenant of the house No. 6 Upper

could not be received in evidence, and that appellant was bound to show that on the 20th of July 1859 he occupied premises then separately rated.—Vote disallowed.

Appellant claimed to vote in respect of the occupation of house No. 20 N.-street, in immediate succession from house No. 6 N.-street, for twelve months on and previous to the 20th of July 1859. He had been on the previous registry in respect of No. 6, and came into occupation of No. 20 in May 1859. No. 20 was rated in the rate struck in September 1858, then being in the occupation of P. M., who let part of it to appellant. In the rate struck 20th of August 1859, appellant was rated in respect of No. 20.—*Held*, that the latter rate-book

1859.
Reg. Appeal.
O'RORKE
v.
CARLISLE.

North-street, in the borough of Newry, for twelve months previous to the 20th of July 1858, and in the rate made for the relief of the poor on the 11th of September 1858, for the Newry electoral division in which the borough of Newry is situate, was rated as occupier thereof at the sum of £16. The name of the said appellant appeared on the register of persons entitled to vote at any election for said borough between the 30th of November 1858 and 1st of December 1859; and his name appeared on said list in the words following:—

No.	Name.	Place of abode.	Nature of qualification.	Street, &c., where Property is situate.	Rated value of Premises.
429	O'Rorke, Patrick	Upper North-street	Rated Occupier	6 Upper North-street—House	£16

The said appellant appeared before me, and, having been duly sworn, proved that he had been tenant of the house No. 6 Upper North-street, and had occupied same up to May 1859. That, at the last mentioned date, he became tenant to Patrick M'Elroy of the house No. 20 Upper North-street, at the yearly rent of £27. 10s. Od., and that he removed direct from the house No. 6 to the house No. 20 Upper North-street, and that he was then, and had since continued uninterruptedly, in the actual possession of the premises so taken from the said P. M'Elroy.

The rate-book of the Newry union was produced; whereby it appeared that, on the 11th of September 1858, a rate had been struck, of one shilling in the pound, and the name of the said P. M'Elroy appeared thereon as the rated occupier of the house No. 20 Upper North-street, at £30. The said appellant further proved that he did not take from said P. M'Elroy the entire of said premises, for which the latter was rated at £30. That the said appellant took the shop and dwelling-house, and occupied the same; and that the said P. M'Elroy retained, in his own occupation, the garden and an office-house at the rear of the said house No. 20 Upper North-street, and still retains the same; which last-mentioned garden and office-house formed part of the premises for which the said P. M'Elroy was rated at £30. The appellant did not present to the

guardians of the Newry union a claim to be rated in respect of the premises thus occupied by him. The said appellant produced the rate-book of the Newry union, whereby it appeared that, on the 20th of August 1859, a rate had been struck, and therein the said appellant was rated as occupier of the said house No. 20 Upper North-street, at the sum of £25. And the said appellant offered said last-mentioned rate as evidence to prove the rated value of the house No. 20 Upper North-street, which he had held in immediate succession from the house No. 6 Upper North-street.

On the part of the objector (the respondent), it was urged that the claimant was bound to establish that his right to be placed on the list of electors for said borough was complete on the 20th of July 1859; that he was not, on or previous to the said 20th of July 1859, occupier of the entire of the said premises, for which the said P. M'Elroy was rated at £30, and that I was not at liberty to look at or use the rate-book subsequently to that date, for the purpose of ascertaining the value of the house No. 20 Upper North-street, on the said 20th of July 1859; and that the appellant, not having entered into the occupation of the entire of the premises for which P. M'Elroy was rated in the rate of September 1858, at £30, he was not entitled to have his name inserted on the list of electors. I declined to admit the rate of the 30th of August 1859, to prove the rated value of that portion of P. M'Elroy's premises occupied by the appellant previous to and on the 20th of July 1859, and I expunged the name of the appellant from the list of voters. Should the Court be of opinion that the rate of the 20th of August 1859 was admissible to show the rated value of the house No. 20 Upper North-street, on the 20th of July 1859, the name of the said Patrick O'Rorke is to be inserted on the list of electors for the borough of Newry, if otherwise it is to remain expunged.

THEO. JONES.

D. C. Heron, for the appellant.

The claimant has occupied two houses in immediate succession. Up to May 1859, he was rated, and there is no allegation that the value decreased between that time and August 1859: *Morphy's*

1859.
Reg. Appeal.
O'RORKE
v.
CARLISLE.

1859.
Reg. Appeal.
O'RORKE
v.
CARLISLE.

case (a) is an authority in my favour.—[GREENE, B. It was held in that case, that it was not necessary that the claimant should be rated in respect of each house occupied in immediate succession.]—The claimant there had not been rated for the last of the houses at all, there not having been any rate struck during his occupation.—[HUGHES, B. The difficulty is, that he occupies in immediate succession premises, and there is no evidence of the value of them, save the rate-book made on the 20th of August 1859. Can this be used as evidence of their value at another time?—CHRISTIAN, J. The question is, not what was the value of the house No. 20, but what was the rated value of the premises occupied by the claimant? and in July 1859, the premises occupied by him were not of any rated value at all, the shop, &c., not being separately rated.]—*Reilly's case (b)* is an authority.—[GREENE, B. There was a separate rating in that case.]—See *In re M'Donnell (c)*.

GREENE, B.

It is plain the claimant may obtain the franchise by occupying several sets of premises in immediate succession, but they must all have been rated.

CHRISTIAN, J.

It is clear we cannot use the rate-book made on the 20th of August 1859, to prove the rated value of the premises in July previous, when we know, as a fact, the premises were not rated at all on that day.

Per Curiam.—Affirm the decision.

(a) 6 Ir. Com. Law Rep. 418.

(b) 2 Ir. Com. Law Rep. 560.

(c) 1 Ir. Cir. Rep. 1.

1859.
Reg. Appeal.

THOMAS FORD, *Appellant* ; JOHN CORCORAN, *Respondent*.

Dec. 13.

THE following case was submitted for the consideration of the Court by the Revising Barrister, J. Moody, Esq.:—

At the Court of Revision, held by me, at the Quarter Sessions for Cork county, West Riding, commencing on the 21st day of October 1859, the name of the appellant appeared on the claimants' list No. 11, published by the Town-clerk of the borough of Bandon-bridge, of persons claiming to have their names on the registry of voters for the borough of Bandon-bridge. A copy of the entry of the claim of the said appellant, as it appeared on the said list No. 11, inserted by the Clerk of the Town Commissioners, is as follows:—

Column for entering Clerk of Town Commissioners' objections.	Christian-name and Surname of each claimant at full length.	Place of Abode.	Nature of Qualification.	Date of Registration, if any, under 2 & 3 W. 4, c. 88.	Street, lane or other like place in this borough, where the property is situate, and number of the house, if any, when the right depends on property.
	Ford, Thos.	North Main-street.	Rated occupier of houses and tenements rated at £8 and upwards, in immediate succession for twelve months, on and previous to the 20th of July 1859.		North Main-street.

A notice of objection having been duly proved to have been served on the said appellant by the said respondent, it was con-

Held, per Curiam, that the claim should have been allowed; per GREENE, B., HAYES and CHRISTIAN, JJ., that the list was defective, but that the defect was such that the Revising Barrister should have amended it under sec. 55; per HUGHES, B., the Town-clerk's list was sufficient; per HUGHES, B., the Barrister was not only entitled, but bound, to amend.

1859.
Reg. Appeal.

FORD
v.

CORCORAN.

tended, on the part of the respondent, that the entry of the notice, as it appeared on the list No. 11, as prepared by the Clerk of the Town Commissioners, was insufficient.

On the part of the appellant it was contended, that the notice served by him was a correct compliance with the statute, and that, under the 7th section of 13 & 14 *Vic.*, c. 69, he was entitled to be put on the registry for the ensuing year. It was contended, on the part of the appellant, that the notice of claim served by him on the Clerk of the Town Commissioners was sufficient; but I refused to allow the said notice of claim to be given in evidence, as I conceived myself bound by the entry on the list No. 11, published by the Clerk of the Town Commissioners.

I disallowed the claim, and expunged the name of Thomas Ford from said list, as I considered the claim as set out in Clerk of the Town Commissioners' list No. 11 insufficient. If I was right, the name of Thomas Ford is to remain expunged; if wrong, it is to be inserted on said list.

J. MOODY.

Kaye, for the appellant.

The entry of the claim is a compliance with the Act [reads s. 7]. In *Bartlett v. Gibbs* (a), and *Hutchins v. Brown* (b), the facts were similar. In all the cases of immediate succession the notices actually served were always read. The Barrister in this case held himself bound by the entry of that notice made by the Town-clerk.—[CHRISTIAN, J. Section 55 appears clearly to point out the duty of the Revising Barrister as to correcting mistakes in any list. It goes on to say:—"Such Assistant Barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted, or insufficiently described, be supplied to the satisfaction of such Assistant Barrister, before he shall have completed the revision."]—See *Eaden v. Cooper* (c).

Sir C. O'Loughlen, for the respondent.

Wherever a claim is made to be registered in respect of premises

(a) 1 *Lutw. Reg. Cas.* 73; *S. C.*, 5 *M. & G.* 81.

(b) 1 *Lutw.* 328.

(c) 2 *Lutw.* 183.

held in immediate succession, it is necessary that the several premises so held should be set forth in the column describing the nature of the qualification. By section 34, it is the duty of the Town-clerk to publish a list of such claims. If the Town-clerk has omitted to publish the claim as furnished to him, an action may lie against him; but it would open the door to fraud if the Revising Barrister were to amend a claim as set forth in the list. His jurisdiction to do so depends on section 55. The first part of that section might appear to give him jurisdiction, but on the construction of the entire section it has been ruled that he has no such jurisdiction: *Bartlett v. Gibbs* (a), which was decided on the English statute, the section there being similar to the present.—[CHRISTIAN, J. The point in that case was, that the premises were not said to be held in immediate succession.—HAYES, J. In that case there was nothing to amend by. If the Town-clerk copied the notice of claim wrongly, the well-known principle that a man is never to lose his vote by reason of any mistake of the officer would apply.—CHRISTIAN, J. If the amendment sought in *Bartlett v. Gibbs* were made, it would be changing the nature of the qualification.]—There is another case on the same point, *Onions v. Bowdler* (b); there the claim was for “a house” in immediate succession.—[HUGHES, B. Assuming that the Revising Barrister had no power to amend, what is the objection to the list as it stands? What is there to show that both the houses out of which the vote is claimed were not situate in North Main-street, in which case the claim would appear to be sufficiently set forth?—HAYES, J. I should be inclined to consider the claim insufficiently set forth, because the qualification should be so described as to enable any person to find out the premises, and investigate their value. The difficulty Counsel has to contend with is that, assuming the claim, as set out by the Town-clerk, to be incorrect, it is only an incorrect abstract of a correct notice of claim, and the claimant demands to have it compared with the original, and, if necessary, amended.]—He cited *Barnett's case* (c).

1859.
Reg. Appeal.
FORD
v.
CORCORAN.

(a) 5 M. & G. 81.

(b) 5 C. B. 65.

(c) 7 Ir. Com. Law Rep. 369.

1859. *Sullivan*, on the same side, cited *Davies v. Hopkins* (a);
Reg. Appeal. *Flounders v. Donner* (b).
 FORD
 v.
 CORCORAN. *Whiteside*, in reply, cited *Howell v. Stephens* (c).

GREENE, B.*

The opinion of the Court in this case is unanimous, that the decision of the Revising Barrister should be reversed; but we are not all agreed on the exact grounds of our decision. I shall briefly state the opinion I myself take of the question. Viewing this list by itself, I am disposed to say that the description in it of the property out of which the voter proposes to qualify is not quite accurate, and does not strictly comply with the statute; but I think the inaccuracy only amounts to an imperfect description, and that thus the case is distinguishable from both those cited for the respondent, which appear to have been decided on the ground that the change proposed to be made in the list was the insertion of something which did not appear there at all, but not the completion of an imperfect description. It is enough to refer to one passage in the case in *5 Com. Bench*, to show that the real ground of decision in that case was as I have stated it. Wilde, C. J., says:—"It is material to see whether the proposed amendment consists in the correction of something already stated in the list, but stated imperfectly, or in the introduction of matter that is altogether new. It seems to me that it is of the latter description:" *Onions v. Bowdler* (d). The objection to the description in the case at present before us seems to be no more than that there is an imperfect description of the qualification, not that there is an omission of any material thing which must be supplied. The same observation applies to the case in *Lutwyche*; the opinion of the Court appears to have been that a

(a) 3 C. B., N. S., 376.

(b) 2 C. B. 63.

(c) 28 L. J., C. P., 105.

(d) 5 C. B. 73.

* Owing to the absence of the learned Judge, this judgment has not been submitted for his approval.—Rzp.

matter which had been wholly omitted could not be supplied. Tindal, C. J., says:—"As the whole object of the notice would be defeated, if the omission of any part of such qualification could be remedied at the Court of Revision, we are of opinion that the addition of the premises in West-street to the qualification inserted on the list would be a change in the description of the qualification not warranted by the provisions of section 40 of the statute of *Victoria*:" *Bartlett v. Gibbs* (a). I take it there is in this case an imperfect description of the whole qualification. I am of opinion it was not only the right, but the duty, of the Revising Barrister to have corrected it. The proposition submitted to us on the other side is, that he was bound by the Town-clerk's list as presented to him, and that he could not travel out of that. I am of opinion that position cannot be maintained. In the form in which the case has been presented to us by the Revising Barrister, if we consider his decision erroneous on one or other of the two points, the claimant's name is to be inserted on the registry; being of opinion that he was wrong in his decision on the second point, I must hold that the claimant is entitled to his franchise.

1859.
Reg. Appeal.
FORD
v.
CORCORAN.

CHRISTIAN, J.

The view I take of this case is substantially the same as that of my Brother GREENE. Two questions are presented by the Assistant Barrister's statement. The first is as to the validity of the entry in the Town-clerk's list No. 11; that is an entry of a claim as rated occupier of houses rated at £8 and upwards, in immediate succession, in North Main-street. I am of opinion that this entry is insufficient, inasmuch as it does not state either the number or the rating of each house. The entry may mean either that the total rating of all the houses occupied in succession amounted to £8 annually, or that each of them was rated at £8. I think that is not a good description of the qualification. But then the second question arises, namely, was the Barrister right in refusing to look at the notice of claim served by the claimant under the 34th section, and, if that were found correct, to amend the list according to it? That notice, which was

(a) 1 Lutw. 91.

1859.
Reg. Appeal.
 FORD
 v.
 CORCORAN.

the document from which the Town-clerk prepared the list, and from which it was his duty, under the 34th section, to make a *verbatim* copy, was, it was alleged, correct. It was in Court, and was tendered to the Barrister, but rejected by him, upon the ground that he was bound by the entry. In that I think he was wrong. I think he had power, under the 55th section, to amend the list, by making it conformable with the notice, if the latter was right; and with that view he ought to have examined the notice. The case is distinguishable from those which were cited, in which new matter was sought to be introduced into the list; whereas what was here sought was, to remove an ambiguity in a statement which the list contained. Upon this latter point, therefore, I think the Barrister was wrong.

HAYES, J.

I concur with the other Members of the Court; and on the grounds stated by my Brothers GREENE and CHRISTIAN, I think that the Town-clerk's list, as it stands, is insufficient. For the information of the public, it is important that a party giving notice of his claim to vote should apprise the public of the several premises occupied by him in immediate succession, and out of which his title to vote may be claimed. By this means, any party interested in opposing the claim will be enabled, from an examination of the rate-books, to ascertain whether each of the premises so occupied was or was not rated at the proper sum to entitle the claimant to vote, and in fact to follow the claimant through his entire twelve months' occupation. The claimant being of the same opinion, the notice served by him is correct; but the statement in the list, which ought to have exactly followed that notice, is defective in this particular. I therefore think that there was an important omission. On the other hand, I think that it was the duty of the Revising Barrister, under section 55, to have supplied that omission, and, from the materials which were at his hand, that he was in error when he decided that he had no power to do so.

Per Curiam.—Allow the claim.

1859.
Reg. Appeal.

BRANAGAN, *Appellant*; SHAW, *Respondent*.

Dec. 13.

THE following case was submitted for the consideration of the Court by the Revising Barrister for the borough of Bandon-bridge:—

At the Quarter Sessions held at Bandon, commencing October 21st, 1859, the name of William Shaw (the respondent) appeared on the list No. 11 of persons claiming to have their names inserted on the register of voters for said borough. The following is a copy of the entry of the claim:—"William Shaw, Woodlands, rated occupier in succession for offices and store at Clogheenavodig, valued £10; to land at Clogheenavodig, valued £10. 5s. 0d.; Clogheenavodig and Clogheenavodig." An objection having been duly proved, the said respondent proved that he occupied offices and store at Clogheenavodig up to February 1859, and then got possession of the land at Clogheenavodig. A notice of claim to be rated for £10. 5s. 0d., out of Clogheenavodig, was proved to have been served on the 4th of August last, by respondent, on the clerk of the union.

On referring to the rate-book, the lands of Clogheenavodig, with a dwelling-house and other land not in respondent's possession, were rated to one Thomas Neill at £20. 5s. 0d. It was contended, on the part of the appellant, that inasmuch as the respondent did not occupy the entire of the premises at Clogheenavodig, which were rated to Thomas Neill at £20. 5s. 0d., there was no power given to the Court to apportion the value of the premises; and that, as nothing appeared in the rate-book to show that the portion of the lands he occupied in succession at Clogheenavodig were of the value of £10. 5s. 0d., the claim should not be allowed. I held that the said William Shaw was entitled to be inserted on said list, and retained the name of said William Shaw accordingly.

The qualification of the claimant was set out on the claimants' list as follows:—"Rated occupier in succession of offices at C., valued at £10, to land at C., valued at £10. 5s. 0d." The land held at C. was a portion of certain premises for which one T. N. was rated at £20. 5s.; but no rate had been struck since the claimant came into possession of the portion. The claimant had served a claim on the clerk of the union to be rated in respect of the portion occupied by him at £10. 5s. 0d.—*Held*, reversing the decision below, that the claimant was not entitled to vote.

J. MOODY.

1859.
Reg. Appeal.
BRANAGAN
 v.
SHAW.

Kaye (with him *Andrews*), for the appellant.

James Murphy, for the respondent.

There was no separate rating of the premises occupied by the respondent, because there had been no rate struck during the time he occupied them. Suppose there was no necessity to strike any rate for five years, is it to be said that every person who may in the interval come into possession of premises not previously rated is to lose his vote?

CHRISTIAN, J.

The first requisite under section 110 is, that the voter shall occupy premises rated at £8 or upwards. Now were the premises in question rated at £8 or upwards? I say no; they were not rated at anything. These, and certain other premises not in his occupation, were rated at one sum of £10; but there was no rating of these individual premises. If the claimant be really aggrieved, by the fact that these premises should be separately rated, and are not, he must seek his remedy elsewhere.

HAYES, J.

The duty of the Revising Barrister is to insert on the registry the name of some person in respect of a certain rated value which appears on the books; but the claimant here seeks to substitute another value, which is not rated in the books.

GREENE, B.

The Revising Barrister must have apportioned the value of these premises.

Per Curiam.—Reverse the decision.

1859.
Reg. Appeal.

CORCORAN, *Appellant* ;
BERNARD and BLEAKELY, *Respondents*.

Dec. 13.

THE following case was submitted for the consideration of the Court by the Revising Barrister, J. Moody, Esq., at the Quarter Sessions held at Bandon, for the borough of Bandon-bridge, commencing the 21st of October 1859.

The respondents were returned on the list No. 7 of persons entitled to vote in the election of a Member for the borough of Bandon-bridge, in respect of hereditaments within said borough, the entry in said list being as follows :—

Christian and Surname.	Place of abode	Nature of Qualification.	Description of Premises rated.	Rated value of Premises.
Bernard, Hon. & Rev. Charles B., and Bleakely, Rev. John	Kilbrogan Glebe	Rated Occupiers	House, Offices & Yard, in Water-gate-street	£ s. d. 21 0 0

The names of the respondents were duly objected to; and the facts of the case are as follow :—The said Hon. and Rev. Charles B. Bernard and Rev. John Bleakely took the premises out of which they sought to be registered, as tenants, and pay the rent and taxes for the same. A large room on the first landing is occupied by a society called the Young Men's Association, for which they pay £10 a-year. The shop is used for the sale of Tracts, for which a rent of £5 a-year is paid by a society called the Bible Society. A person named Payne attends to the said shop, and is in charge of the entire premises; he does not diet or sleep in the house. There is one common entrance to the shop and room occupied by the Young Men's Association. In the outside premises there is a school kept, for which a rent of £5 a-year is paid. To this school there is a separate entrance through a lane, and a door made for the purpose. This is not under the roof of the main house; but to the

The respondents were co-lessees of certain premises, and jointly liable to the rent and taxes of the same. It did not appear that they used the premises for their own purposes. Two separate societies occupied portions of the premises as tenants from year to year, and paid rent for them; one servant was in charge of the entire premises; the rent and taxes for which the respondents were liable, and the servant's wages, were paid by means of subscriptions paid by members of the two societies, who occupied as undertenants. — *Held*, reversing the decision of the Revising Barrister, that the respondents were not entitled to register out of the premises. — *Luckett v. Bright* (1 Lut. 456) distinguished.

1859.
Reg. Appeal.
 CORCORAN
 v.
 BERNARD.

main house there is attached a small building called a linney, and to this linney is attached the school-house. A number of persons subscribe to the support of the aforesaid societies ; and, from the moneys so obtained, and the rents paid as aforesaid, the rent to which the said Charles B. Bernard and John Bleakely are liable is paid, as well as the salary to the said Payne, who is in charge as aforesaid of the entire premises. The Rev. Richard Hussey Loane is treasurer of the general funds so collected and received. The said Charles B. Bernard and the Rev. John Bleakely do not, nor does either of them, in any other way occupy the said house, offices and yard, out of which they were so returned, or any part of them, except in the manner hereinbefore mentioned.

It was contended before me that the said Charles B. Bernard and John Bleakely did not occupy the said house, offices and yard, or any part of them, as tenants or owners within the meaning of 6th section of the Act 13 & 14 Vic., c. 69 ; but I held that, under the circumstances, they did occupy as tenants, within the meaning of the Act, they being jointly liable for the rent and taxes ; and I admitted them to the franchise for the said borough. If I was wrong in law in doing so, the names of the said Charles B. Bernard and John Bleakely are to be expunged from the registry.

J. MOODY.

James Murphy, for the appellant.

It is clear, on reading the case, that there was no occupation by these gentlemen, as tenants or otherwise.

The COURT called on—

Whiteside, for the respondents.

The mere fact of the shop and the large room being let to other parties does not disentitle the respondents to a vote out of the premises of which they are stated to be tenants, and for which they pay rent and taxes. The point is ruled by *Luckett v. Bright (a)*.—[HAYES, J. In that case, the parties claiming really occupied a portion of the premises.]—So do the claimants here ; their occupa-

(a) 1 Lut. 456.

tion is not disputed.—[CHRISTIAN, J. I think there is enough in this case to fix these gentlemen with the character of trustees; and, by section 60, trustees are precluded from the right to vote out of the premises which they hold in trust.—HAYES, J. In that case, the claimants themselves occupied the remainder of the premises.]—So they do in the present case; the Revising Barrister finds that they do occupy. In the case cited, the claimants did not reside in London at all; here, it is found that these two gentlemen are tenants. That is not disputed; nor is the fact that they are liable for rent and taxes.—[CHRISTIAN, J. There are two other parties who are stated to occupy these premises really as tenants; so do not say that the occupation of the claimants is not disputed. I take it, on the case stated, that the other parties are tenants from year to year, which is a tenancy which excludes the occupation of the claimants.]—That point is ruled otherwise: *M'Cabe's case (a)*; *Toms v. Luckett (b)*.

1859.
Reg. Appeal.
CORCORAN
v.
BERNARD.

Andrews, on the same side, cited *Rogers on Elections*, p. 65.

The appellant was not called on to reply.

GREENE, B.*

The question in this case is whether, upon the facts stated by the Revising Barrister, the claimants occupied the premises, within the meaning of the Act of Parliament? I say "upon the facts stated," because the Revising Barrister has expressly said that they were not in any other way occupiers. Now what were these facts? I may say that, upon the mere statement of this case, we were all of opinion that the decision below was erroneous; but the point has been so strongly argued by Counsel at the Bar, that I shall set out our reasons at somewhat greater length than I should in an ordinary case. The first fact is, that these gentlemen are tenants of these

(a) 7 Ir. Com. Law Rep. 391.

(b) 2 Lut. 19.

* Owing to the learned Judge's absence, this judgment has not been submitted for his approval.

1859.
Reg. Appeal.
 CORCORAN
 v.
 BERNARD.

premises, and pay the rent and taxes therefor. The Revising Barrister appears to have been of opinion that they were occupiers, because they were, on the facts proved to him, jointly liable for the rent and taxes. Having stated that they were lessees of the premises, the Revising Barrister proceeds to state the existence of the Young Men's Association, and how it was constituted. It is not even stated that the present claimants were members of this association, or in any way connected with it. It appears, further, that the shop was taken by a society called the Bible Society, for the sale of Tracts, and that a rent of £5 per annum was paid by that society for the shop. Again, there is nothing from which we can infer that the claimants were members of the latter society. Then the case proceeds to mention a person of the name of Payne, who is stated to have been in charge of the entire of the premises, but who does not live in the house. It does not appear on the face of the case whose servant this person was. Then the case disposes of the premises outside the main building: a school is kept there, for which a rent of £5 per annum is paid, and to which there is a separate entrance. A number of persons subscribe to the aforesaid societies, and, from the money so obtained, and the rents paid as aforesaid, the rent to which the respondents are liable is paid, as well as the salary of Payne. Now, as Payne is stated to attend to the shop, and as there is no statement that he is the servant of the respondents, the only conclusion, if any, that I can draw [as to his character, is, that he is the servant of the Bible Society. These being the facts of the case, it appears most plainly to me, on the bare statement of them, that there is no occupation of these premises by the respondents; but, on the contrary, that there is a complete exclusion of their occupation, because we have two distinct parties paying a distinct rent for portions of the premises, and having a servant who is stated to be in possession of the entire of the premises.

The case of *Luckett v. Bright* (a) was pressed so strongly upon us in the argument at the Bar, that I think it necessary to show the distinction between that case and the present, at some length. The

(a) 1 Lat. 456.

persons there claiming to register were persons subscribing to the common fund out of which the rent of the premises was paid, and were members of the society for the purposes of which the premises were occupied; and, when they came to London, these claimants used to transact business, partly that of the society to which they belonged, and partly their own, in these premises. Of course we know there may be occupation without residence; but, in the case before us, there is no evidence of any such occupation. The objection taken in the case of *Luckett v. Bright* was, that the claimants were not occupiers, or, at all events, were only occupiers in common with the other members of the society. Tindal, J., in his judgment says:—"It clearly appears that when in London they go to the house as often as they please, and that they transact there not only the business of the association, but also their own business." And Maule, J.:—"The respondent and his co-lessees were the persons to whom the lease was made, and they used the house, when in London, for such purposes as they thought fit." Here, not only is there nothing to show that the respondents Bernard and Bleakely used the house in this manner, but it appears plainly that they could not have used it so. Cresswell, J., says:—"There is nothing to show that they have parted with the right which they possess, as lessees, of turning away every one of the servants in the house; nor does it appear that the other members of the association came into the house against the will of the lessees." Now is there not enough in the present case to show that the lessees have entirely parted with their right to turn the Bible Society, the Young Men's Society, and the caretaker Payne, out of possession? In fact nothing can be more pointed than the contrast between this case and the one cited; and this appears to me to dispose of the argument of Mr. *Whiteside*, which appears to have been that the occupation of Payne was the occupation of the claimants; but Payne, and the two societies whose servant he was, appear to have had the exclusive occupation of these premises. It appears clearly that this vote cannot be sustained.

CHRISTIAN, J.

It is important that there should be no mistake as to the facts of

1859.
Reg. Appeal.
CORCORAN
v.
BERNARD.

1859.
Reg. Appeal.
CORCORAN
v.
BERNARD.

this case. Although the lease was taken out in the names of these two claimants, and they were legally responsible for the rent and taxes, it is plain that no personal enjoyment by them was contemplated. The rent was to be paid partly by means of subscriptions, and partly by means of the several rents to be paid by other parties, who were to occupy portions of the premises respectively. The case submitted to us states that the claimants did not occupy the premises, or any part of them, in any other way than as therein stated. Now the mode of that occupation is stated thus:—Three distinct bodies, of none of whom does it appear that the respondents are members, were in occupation each of a part, which parts taken together constitute the entire of the premises, as permanent tenants from year to year—I say the entire of the premises, because it is so that I understand the statement. Here, therefore, is a case in which every inch of the premises is covered by a permanent occupation by others than the claimants. But it is said there is the caretaker Payne, who might have been dismissed by the claimants at any time. It does not appear in the case that he might; but, even if it did, for whom was he in charge of the premises as servant? Clearly for the societies who were undertenants in possession. His wages were paid by those societies out of the moneys received by the Rev. Mr. Loane, the treasurer. Payne was, therefore, no servant of the claimants; and, even if he were, his dismissal would not have given them the right to the possession of the premises. That is at once the particular distinction between the present case and that in *Lutwyche*. The distinction between this and *McCabe's case* is that, although in that case, as in this, there was an undertenant, still that undertenant was a mere lodger, and his occupation was the occupation of the claimant. The result is that, although the claimants are legal owners of the premises, and liable to the rent, yet they have not been for a moment in occupation of any part, and that therefore the decision of the Revising Barrister was wrong.

O'BRIEN, J., concurred.

Per Curiam.—Reverse the decision.

1859.
Reg. Appeal.

PETERSON, *Appellant*; BALFOUR, *Respondent*.

Dec. 13.

THE following case was submitted to the Court by the Revising Barrister for the borough of Enniskillen :—

The appellant duly served a summons on the respondent to attend at said Court of Revision and give evidence. The respondent James Balfour relied on his name appearing on the register of the previous year, and on the list No. 7, entitling him, under the provisions of 13 & 14 Vic., c. 69, to a *prima facie* case, and declined to be examined by the solicitor for the appellant, until some other evidence was given *aliunde* to displace his said *prima facie* case. I was of opinion, under the circumstances, that I ought not to compel him to be examined, or require him to do so until some other evidence was given *aliunde*. The appellant then examined some witnesses, but having failed to give any evidence that affected the respondent, I retained his vote.

The question for the opinion of the Court of Appeal is this: Should the name of the party be retained on the list of voters, on the *prima facie* case of being on the register of the previous year, and on the list of the present, such party having declined to give his own personal testimony until some evidence *aliunde* should be given, displacing his right? I decided that the party's name should be retained, under such circumstances (no such evidence having been given). If I was wrong, the name of the respondent is to be expunged from the list of voters in said borough; if I was right, it is to be retained thereon.

H. GORGES.

R. Douse (Serjeant *Fitzgibbon* with him), for the appellant.

The question turns on sections 55, 56; see *Byrne's case* (a).—
[HAYES, J., referred to the Evidence Amendment Act, s. 2.]

Brereton (with him *Exham*), for the respondent.

(a) 2 Ir. Jur., N. S., 102.

The respondent's name appeared on the previous registry, and on the list No. 7. He was summoned by the objector, who proposed to examine the respondent to prove that the respondent was not entitled to be on the registry then under revision. The respondent declined to be examined, until some evidence was given to displace his right, and was not examined. The Revising Barrister having allowed his vote:—
Held, the respondent was bound to give his testimony, and the Revising Barrister's decision was reversed.

1859.
Reg. Appeal.
PETERSON
v.
BALFOUR.

GREENE, B.

The case amounts to this ; the claimant is called on to give his testimony as to his own qualification, and he refuses to do so until some evidence is given from other sources to displace his right to vote. The Revising Barrister has decided that the claimant is entitled to take this course. I am of opinion he was not so entitled. Suppose he had had a qualification, and had admitted to some person his having lost that qualification, can it be said that he ought not to be examined as to that point ?

Per Curiam.—Allow the appeal.

The Rev. MARTIN CREAN and another, *Appellants* ;
THOMAS R. METCALF, *Respondent*.

Dec. 13.

In the rate-book four persons appear rated as occupiers in respect of premises of the annual value of £30. Only two of those four persons (the appellants) were named as lessees in the lease of the premises, but all four were liable to contribute to the rent.—*Held*, the two appellants could not maintain their right to register, they being rated along with two others, and the value of the premises not being sufficient to allow of four persons voting thereout.

THE following case was stated by the Revising Barrister for the city of Dublin :—

At the Court of Revision held at Dublin, on the 8th of September 1859, the names of the appellants, the Rev. Martin Crean and the Rev. William Walsh, appeared upon the list No. 7 of persons entitled to vote at the election of Members for the city of Dublin. The following is a copy of the entry of the names of the said appellants in the said list :—

Names.	Place of abode	Nature of Qualification.	Name and Description of Premises . rated.	Rated value.
Crean, the Rev. Martin, and three others.	15 John-st., West.	Rated occupiers of several hereditaments herein stated.	Chapel-house, 15 John-st., West.	£ s. d. 30 0 0
Walsh, the Rev. William, and three others.	Same.	Same.	Same.	Same.

The respondent, whose name appears on the list of voters for the said city, objected to the names of the said appellants, and appeared in support of his objection. I then required it to be proved that the said appellants were entitled to have their names inserted on the said list, in respect of the qualification therein described. The names of the appellants appear on this year's register. The rate-book for the year 1859 was produced, and it appeared that the said appellants and two other persons, that is to say, the Right Rev. Daniel O'Connor and the Rev. Patrick Pentthony, are jointly rated as joint occupiers of the said premises. The following is an extract from the rate-book :—

1859.
Reg. Appeal.
CREAN
v.
METCALF.

No.	Street.	Occupier.	Description.	Annual value.
15	John-st., West.	The Rev. Martin Crean, Rt. Rev. Daniel O'Connor, Rev. William Walsh, Rev. Patrick Pentthony,	Chapel-house.	£ s. d. 30 0 0

It was proved that by indenture of lease, executed in the year 1857, the rated premises were demised to the said appellants, the Rev. Martin Crean and the Rev. William Walsh, and to a third person, the Rev. A. B., their executors and administrators, for a term of years not yet expired, at a yearly rent of £30, which indenture contained the usual covenants, on the lessees' part, to pay the rent. The premises were take as a residence for the officiating clergymen of John-street Chapel, and the persons named as lessees were trustees for that purpose. The appellants, the Rev. Martin Crean and the Rev. William Walsh, and the Right Rev. Daniel O'Connor and the Rev. Patrick Pentthony, are the officiating clergymen of John-street Chapel, and have resided in and occupied the rated premises for twelve months previous to the 20th of July in this year. By arrangement between themselves they pay the rent of the premises (reserved by the lease) out of a common fund; and, in case of any deficiency in that fund, are all equally liable to contribute to the rent. The occupation of all is alike, and their rights of enjoyment are co-extensive. It was insisted, on the part of the appellants, that as they are named as lessees in the lease, their occupation was superior in law to that of the other clergy, and that

1859.
Reg. Appeal.
 CREAN
 v.
 METCALF.

they alone were to be regarded as occupying as tenants within the meaning of the 6th section of the Parliamentary Voters Act.

I was of opinion, and decided, that the four persons rated, that is to say, the appellants and said two other clergymen, jointly occupied the premises as tenants within the meaning of the 6th section of the said Act; and inasmuch as the net annual value of the premises, £30, divided by the number of persons rated, did not give a net annual value of £8 to each, I expunged the names of the said appellants from the said list. Should the Court of Appeal be of opinion that I was wrong, the names of the appellants should be inserted in the register of voters for Usher's-quay ward.

CHARLES SHAW.

P. Keogh (Sir *C. O'Loghlen* with him), for the appellants.

The case of *Luckett v. Bright* (a) is an authority for the appellants. They are liable for the entire rent, and are the real tenants; the occupation of the others is only permissive.—[HAYES, J. Suppose the lease itself stated that these premises were conveyed to the appellants in trust for themselves and two others, would not the decision be right?—Yes.—[HAYES, J. Then does not the case show that the fact was so?—CHRISTIAN, J. Suppose that you succeed in the first part of your argument, namely, that the two claimants alone occupied these premises as tenants, still the other requirement of the section is not complied with, for these two are rated to the poor, but are only rated with the others.]

Brereton and *Purcell*, for the respondent.

GREENE, B.

In order to establish the franchise in this case, it was necessary to show that the claimants were rated to a certain amount for the relief of the poor; in order to show that, the appellants produce a rate-book which shows four persons rated. This franchise cannot be maintained.

(a) 1 Lut. 456.

CHRISTIAN, J.

The appellants argue that, although four persons were in occupation of these premises, only two of them occupied as tenants. This places them in a dilemma; for, by section 6, the persons occupying as tenants or owners must be the same as those rated to the poor; but here there are four rated.

GREENE, B.

We decide this case on the construction of section 6.

Per Curiam.—Affirm the decision.

1859.
Reg. Appeal.
CREAN
v.
METCALF.

THOMAS C. SCOTT and others, *Appellants* ;
THOMAS R. METCALF, *Respondent*.

Dec. 13.
1860.
Feb. 9.

THE following case was stated by the Revising Barrister for the city of Dublin:—

At the Court of Revision, held at Dublin, on the 8th of September 1859, the names of the appellants, T. C. Scott, P. Spain and J. Rooney, appeared on the list No. 7 of persons entitled to vote on the election of Members for the city of Dublin, as rated occupiers.

The respondent, whose name appears on the list of voters for said city, objected to the names of the said appellants, and appeared in support of his objection. I then required it to be proved that the appellants were entitled to have their names inserted in the said list, in respect of the qualification therein described. The fol-

Appellants were partners in trade, and joint owners of a house and offices, rated at £113. They occupied part of the premises for the purposes of their trade, but did not reside in the house. The upper portion of the house was let, at a yearly rent, by lease, to Messrs. N. and F., solicitors, who

carried on their business there, but did not reside. There was one servant, paid by the appellants, who resided in the house and took care of the entire premises. The appellants and Messrs. N. and F. had access to their several portions of the premises by the same hall-door, which was locked every night by the servant.—*Held*, the appellants were not entitled to register as occupiers under section 6.

Unless the owner has the general control and superintendence of the house, the person who occupies under him at a rent is not a lodger.

1859.
Reg. Appeal.
SCOTT
v.
METCALF.

lowing is a copy of the entry of the names of said appellants in said list:—

Name.	Abode.	Nature of Qualification.	Description of Rated Premises.	Value.
Scott, Thomas C., and two others,	17 Merchants'-quay,	Rated Occupier of several hereditaments herein stated,	House, Store and Yard, 17 Merchants'-quay,	£113
Spain, Patrick, and two others,	Same,	Same,	Same,	Do.
Rooney, John, and two others,	Same,	Same,	Same,	Do.

The rate-book for the year 1859 was produced, and it appeared that the three appellants were jointly rated for the said premises as occupiers.

It was proved that the appellants are joint owners of the house 17 Merchants'-quay; that they are partners in trade, and there carry on their business; that they occupy, for the purposes of their business, the ground and parlour floor of the house, the stores and yard in respect of which they are rated; that they do not, nor does any one of them, reside in the house; that they occasionally dine in the house, and partake of meals there; that a porter in their employment resides in the house with his wife; that his wife takes charge of and cleans the house, cooks the dinner, and is paid wages by the appellants for these services. That by indenture of lease, made in the year 1856, between the appellants of the one part, and Messrs. Nolan and Foot of the other part, the said appellants demised the second, third and fourth floors, the entire upper part of said house, to Messrs. Nolan and Foot, their executors and administrators, for a term of years yet unexpired, at a yearly rent; that Messrs. Nolan and Foot, ever since the execution of the said lease, have been, and still are, in possession of the upper part of the house 17 Merchants'-quay, and there carry on their business as solicitors. Messrs. Nolan and Foot do not, nor does either of them, reside in the house, nor have they any servant residing there; the

wife of the porter takes care of and cleans their apartments. There is but one hall-door, opening from the house, opening in the street, which is locked every night by the porter or his wife. Through the door the appellants have access to their portion of the premises, and Messrs. Nolan and Foot to theirs.

I was of opinion that the appellants did not occupy the entire rated premises, as tenants within the meaning of the 6th section of the Parliamentary Voters Act, and I expunged their names from the list. Should the Court of Appeal be of opinion that I was wrong, the names of the appellants should be inserted on the registry of voters for the Merchants'-quay ward.

CHARLES SHAW.

Sir *C. O'Loghlen*, and *Keogh*, for the appellants.

They cited *Potts v. Smedly* (a); *Wansey v. Perkins* (b); *Wauchob v. Reynolds* (c).

Brereton (with him *Purcell*), contra.

Sir *C. O'Loghlen*, in reply, cited *Regina v. Inhabitants of Bolton* (d); *Bolton's case* (e); *Downing v. Luchett* (f).

Cur. ad. vult.

The judgment of the Court was now delivered by—

GREENE, B.

In this case the Revising Barrister rejected the claim of the appellants, who sought to be registered as rated occupiers of a house, store and yard, 17 Merchants'-quay, of the value of £113. It appeared that they were joint owners of the house, and partners in trade, and occupied, for the purposes of their business, the ground or parlour floor of the house, and also the stores and the yard, but that none of them resided in the house, although they occasionally

(a) 8 Scott N. R. 907; S. C., 7 M. & Gr. 85.

(b) 8 Scott N. R. 978.

(c) 1 Ir. Com. Law Rep. 142.

(e) 4 Ir. Jur., N. S., 106.

(d) 8 B. & C. 77.

(f) 5 Q. B. 40.

1859.
Reg. Appeal.
SCOTT
v.
METCALF.

1860.
Feb. 9.

1860.
Reg. Appeal.
SCOTT
v.
METCALF.

dined there and partook of meals ; that a porter in their employment resided with his wife in the house, having, under an agreement with the claimants, apartments rent free, the wife taking charge of and cleaning the house and cooking dinner, for which services she was paid by the appellants. It further appeared that Messrs. Nolan and Foot, solicitors, held the second, third and fourth floors of the house, being the whole of the upper part, for a term of years, under a lease made in 1856, at a yearly rent, under which the lessees have been in possession of the upper part, where they carry on their business as solicitors, but that they do not reside there, nor have they any servant resident, the porter's wife attending to their apartments ; and that there is but one hall-door opening from the house into the street, which is locked every night by the porter or his wife. Upon these facts the Revising Barrister rejected the claim, having been of opinion that the appellants did not occupy the whole of the rated premises. It has been contended before us that this was a misconception on his part, inasmuch as Messrs. Nolan and Foot are to be considered, in point of law, as merely lodgers, and their occupation as the occupation of their landlords. The question then is, whether Nolan and Foot are lodgers only, or whether they are tenants of part of the premises, in such a sense as that their occupation is their own exclusively, and not the virtual occupation of the appellants? It becomes necessary then to consider who is properly "a lodger" in point of law. The question was discussed in the case of *Toms v. Lockett* (a), in which it was held that a person having exclusive occupation of apartments in a house, at a rent, and who had a key of the outer door, and free and uncontrolled access thereto, at all times, was entitled to be registered as *tenant* of "a building," within the English Reform Act. The argument against the claimant was, that he was not a tenant, but a lodger or inmate ; and the Court, in their judgment, define what is a lodger, as distinguished from a tenant (b). It would appear from this case that unless the owner has, at all events, the general control and superintendence of the house, the person who occupies at a rent under him is not a mere lodger. In page 28, Chief Justice

(a) 5 C. B. 23.

(b) See page 34.

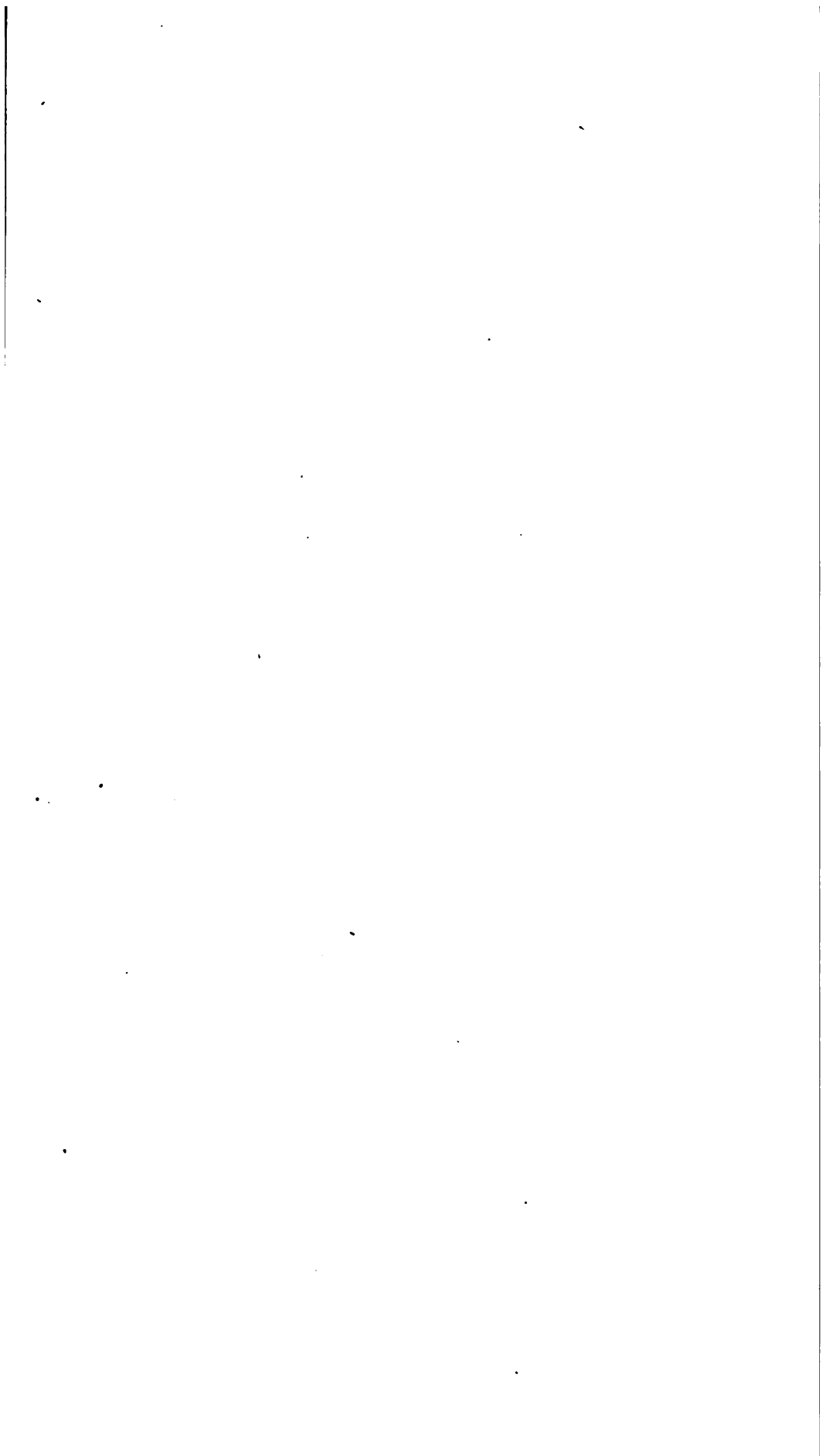
Wilde gives the return made to Parliament by his predecessor, of the grounds upon which, in the cases there referred to, the occupier was held to be a lodger. But it appears to me that the present case is in effect ruled by *Downing v. Lockett* (a), the facts of which are not essentially distinguishable from those now before us. In that case Downing occupied, as a counting-house, a room in a house, in which the landlord had also a counting-house, but did not reside. There was an outer door, locked at night, of which Downing had no key, nor was there a key-hole on the outside. A person employed and paid by the landlord lived in the house for the purpose of protecting the premises, and letting in the several tenants when the door was shut; and it was held that Downing was a tenant entitled to register. Now he was exactly in the position of Nolan and Foot in the present case. Here, as there, they occupied at a rent; here, as there, the landlord likewise occupied a part; here, as there, the landlord did not reside, that is, sleep in the house; here, as there, there was only one outer entrance; here, as there, a person employed and paid by the landlord lived upon the premises, and kept the key of the outer door; the outer door had no key-hole outside, so that the occupiers could not gain access unless through the landlord's servant; Nolan and Foot would, therefore, have been entitled to register as tenants, as Downing was, and it is, therefore, impossible to hold, consistently with this case in 5 C. B., p. 40, that they were only lodgers. In the cases of *Corcoran v. McCabe* (b), and *Wansey v. Perkins* (c), the landlord was resident, which distinguishes those cases from the present. I am, therefore, of opinion that the Revising Barrister was right in holding that the appellant had not an occupation of the whole of the rated premises, and that his decision ought to be affirmed.

(a) 5 C. B. 40.

(b) 7 Ir. Com. Law Rep. 391.

(c) 8 Scott, N. C., 978.

1860.
Reg. Appeal.
 SCOTT
 v.
 METCALF.



APPENDIX.

STEWART v. BALLANCE.

(*Eschequer.*)

H. T. 1860.

Eschequer.

Jan. 11.

THIS was a motion that the proceedings in the cause might be stayed until the plaintiff gave security for costs, upon the ground that he resided out of the jurisdiction, and that the judgment already marked by him might be set aside with costs. It appeared that the summons and plaint was served upon the 9th of December 1859, and was filed upon the 13th. The defendant then served the usual preliminary notice, under the 52nd General Order, requiring security to be given; and, no reply having been given, he served a notice of motion, for the same purpose, on the 21st of December, which was not moveable until the 24th. The time for pleading expired on the 22nd, and on the 23rd the defendant obtained an order to extend the time for pleading to the 4th of January.

A judgment, marked by the plaintiff, pending a motion for security for costs, will be set aside, as of course, if the pending motion be granted. A defendant does not disentitle himself to security for costs by obtaining an extension of the time for pleading.

There was no opportunity, until the present day, for moving the pending motion for security for costs; and on the 5th of January the plaintiff marked judgment.

W. Sidney, in support of the motion.

This judgment must be set aside, if the defendant is entitled to carry his motion for security for costs. Nothing has occurred to deprive him of his right to security. The 52nd Rule requires only that the application should be made before defence filed. By the 54th Rule, where the Court makes an order for security for costs, the defendant has the same time to plead, after the making of that order, as he had at the time of the service of the preliminary notice. Here we took the additional precaution of getting an order to extend the time for pleading. The fact that the defendant obtained time to plead does not disentitle him to security. In England, under the Rule of H. T., 2 *W.* 4, s. 98, the application must be made "before issue joined;" and it has been held, in several cases, that the defendant is entitled to carry such a motion as the present, though he may have previously obtained time to plead, upon the terms of taking short notice of trial: *West v. Cooke* (a); *Dowling v. Har-*

(a) 1 C. B. 312.

H. T. 1860. *man (a); Edinburgh and Leith Railway Company v. Dawson (b);*
Exchequer. Clarke v. Riordan (c).—[PIGOT, C. B. I always understood that
 STEWART to be the practice of the Court].—The defendant, therefore, being
 v. entitled to carry his motion for security for costs, the judgment
 BALANCE. marked pending the motion must be set aside.—[PIGOT, C. B. The
 plaintiff is entitled to mark judgment; but he does so at the peril
 of having it set aside, if the motion for security for costs is granted].

C. Coates, contra.

It is admitted that the judgment must abide the result of this motion. The defendant, however, is not entitled to security for costs. The summons and plaint disclosed on the face of it that the plaintiff was resident out of the jurisdiction, and the application should have been made promptly after that came to the defendant's knowledge. It was known to the defendant long before he obtained time to plead on the 23rd; and he only served his notice on the 21st, which could not be moved until after the plaintiff was entitled to judgment. The defendant should show that he was not aware that the plaintiff resided out of the jurisdiction when he obtained time to plead.

PIGOT, C. B.

We must hear this motion as if it had been moved upon the day for which notice was served. With respect to that branch of the notice which asks for security for costs, I think the defendant has made a clear case for carrying that part of his motion. With respect to setting aside the judgment, the rule of practice is, that whenever a notice of motion for security for costs is served, and pending that motion a judgment is marked by the plaintiff, if that judgment ought to fall, it does so as of course upon the granting of the motion. The plaintiff here marked judgment on the 5th, on which day he was entitled to mark it, were it not for the pendency of this motion. According to the old authorities, an application for security for costs should be made promptly; but the Courts have now fixed a time before which the notice of motion must be served. That time is, in England, before issue joined; in Ireland, before plea pleaded. The defendant here, under the 54th Rule, need not have obtained time to plead at all; and that is another reason for setting aside this judgment. The proceedings must be stayed, until the plaintiff gives the required security, and the judgment must be set aside with costs.

(a) 6 M. & W. 131.

(b) 7 Dowl. P. C. 573.

(c) 9 Ir. Com. Law Rep., App. xxxiv.

H. T. 1860.

Exchequer.

MARTIN v. LANE.

Jan. 20.

THIS was an application that the defendant's fifth plea might be set aside, or that it might be amended, by making same a single defence, on the ground that same was double and embarrassing, and calculated unfairly to prejudice the plaintiff. This was an action for oral slander, and the words charged were, "From what I know of 'the girl's (the plaintiff's) character for the last three years, I could 'not recommend Reardon to marry her.' Special damage—that thereby the plaintiff lost her marriage with Reardon.

A notice of motion to set aside a pleading as embarrassing, under the 83rd section of the Common Law Procedure Act 1853, should state the particular objections upon which the party intends to rely.

The defence objected to, which was by way of privileged communication, stated the facts connected with the speaking of the words, and from which the privilege might be inferred; and the substantial ground of privilege was, that the words charged were spoken by the defendant in open Court, in reply to questions put to the defendant by the Judge, the Chairman of Quarter Sessions for the East Riding of the county of Cork. The plea then concluded, that "the words 'set forth in the counts were spoken by defendant in reply to a 'question of said Court, and were not other nor further than were 'necessary, in order to give a *true* and conscientious reply to the 'question of the Chairman so presiding in that Court; and that 'both John Martin and Bridget Martin (the plaintiff) were present, 'and did not require defendant to be sworn, or object to his replying 'to said question without being sworn; and he spoke the words, 'on the occasion aforesaid, without malice, honestly, *bona fide* and 'believing them to be true, and in furtherance of justice."

D. C. O'Riordan, in support of the motion.

This is a double plea. It avers not only that the words were spoken on a privileged occasion, but also, in substance, that what the defendant said was "true." It says, "in order to give a true and conscientious reply."—[HUGHES, B. An answer which he believed to be true.—GREENE, B. Upon an issue whether this defence is true in substance and in fact, the defendant would not be bound to prove the truth of the words.]—At all events, the use of the word "true" is embarrassing to the plaintiff; and that word ought to be struck out of the plea.

J. Clarke and W. O'Brien, contra.

The word "true" in the plea plainly means "true according to the belief of the speaker." We are willing, however, that it should

H. T. 1860. be struck out, if the plaintiff pay the costs of this motion. Even
Eschequer. if the use of the word "true" were objectionable, which it is not,
 MARTIN the notice does not state that the objection is pointed to the use of
 v. that word.
 LANE.

GREENE, B.

As these motions to set aside pleadings as embarrassing are a substitution for special demurrers, I think that, where such a notice is served, it ought to point out the particular matter in which the plea is defective.

PIGOT, C. B.

I entirely concur in what my Brother GREENE has stated. I think it would be well that, in every instance where an objection to a pleading is made by motion, which is in effect a substitution for a special demurrer, that the same rule should be adopted as was applicable to special demurrers under the old practice, and that the point of objection to the pleading should be specifically stated. It frequently happens that a party comes into Court to support a pleading without knowing precisely the objection which he has to meet. We are disposed at all events, in every such case, to give no costs to the party by whom the objection is made.

CLARKE v. SCULLY.

Jan. 19, 21.

A pleading framed in such a manner as to be susceptible of one construction upon demurrer, and another at Nisi Prius, will be set aside as embarrassing.

THIS was a motion, on behalf of the plaintiff, to set aside the second defence as embarrassing. The action was in trespass for false imprisonment, against the defendant, a Justice of the Peace for the county of Galway. The second defence averred that, "Before and
 " at the time of the committing of the said several grievances mentioned, the defendant was, and still is, a Justice of the Peace of
 " the county of Galway; and that before the committing of any of
 " the said acts, the said plaintiff, being within the jurisdiction of the
 " said defendant, was sued by one Martin Halloran, by summons,
 " before this defendant, at a Petty Sessions, holden at Maam, in
 " said county of Galway, for wages claimed by said Martin Halloran from said plaintiff; and said defendant says said case was
 " adjudicated upon by this defendant, at said Petty Sessions, on the
 " 5th day of January 1859, in the presence of said plaintiff; and upon

" the hearing of said summons, the defendant ordered that the said H. T. 1860.
 " plaintiff should pay to the said Martin Halloran the sum of £1, Exchequer.
 " together with the sum of 1s. 6d. for costs ; and the said defendant CLARKE
 " further saith that, by warrant signed by this defendant, as said v.
 " Justice of the Peace, this defendant directed that said sum of SCULLY.
 " £1, and 1s. 6d. for costs, should be levied off the goods and
 " chattels of said plaintiff ; and the said defendant says, that the
 " said warrant was transmitted to Michael Vaughan, a constable of
 " police, for execution ; and that afterwards, to wit, on the 30th day
 " of March 1859, the said Michael Vaughan returned said war-
 " rant to the defendant, together with a certificate thereon indorsed,
 " signed by said Michael Vaughan, that said plaintiff had no effects
 " on which distress could be made ; whereupon this defendant, after
 " due examination, pursuant to the statute, issued his warrant, and
 " thereby directed that said plaintiff should, in default of payment
 " of said amount, be imprisoned, for the space of one calendar
 " month, in the Galway County Gaol ; and the said defendant says
 " the said plaintiff was, pursuant to said warrant, arrested and con-
 " fined in said Galway Gaol for said calendar month, which are, &c. ;
 " and the said defendant avers that said acts, in said first and
 " second counts of the plaint complained of, were done by this
 " defendant, as a Justice of the Peace, in a matter in which he
 " exceeded his jurisdiction ; and the said defendant avers that said
 " order and warrant of execution have not been quashed, either
 " upon appeal or upon application to Her Majesty's Court of Queen's
 " Bench."

R. Armstrong and *G. O. Malley*, in support of the motion, con-
 tended that this plea was embarrassing, inasmuch as, from the
 ambiguous language used in the averments contained in it, the
 defendant, upon demurrer, might insist on one construction, and, if
 issue were joined, rely upon another construction of it, equally con-
 sistent with the language used. The defendant should specifically
 state what the particular orders and warrants referred to in the
 pleadings were, and the manner in which they were made.

M. Morris, contra.

FIGOT, C. B.

I regard this motion as one of considerable importance. In
 giving judgment yesterday, in the case of *Lawrenson v. Hill*, I had
 occasion to remark upon the great inconvenience which results
 from contriving pleadings in such a manner as that they should

H. T. 1860.

Exchequer.

CLARKE

v.

SCULLY.

speak one thing to the Court upon demurrer, and another thing to the jury and Judge at Nisi Prius. I concur in the view expressed by the Chief Justice of the Common Pleas, in *Ruckley v. Kiernan* (a), cited in the argument that preceded this motion. We are now, fortunately, obliged to deal with pleadings upon general demurrer, the nuisance of special demurrers having been abolished; but we ought still to apply to pleadings what was always an old rule of pleading, that, though for some purposes the pleading should be construed strictly against the pleader, still, in order to support the pleading, every fair intendment should be made. If no motion had been made to set aside this plea for ambiguity, in consequence of the mode in which the order of the Magistrate to arrest is stated, the defendant, upon general demurrer to the defence, would probably have argued, and the Court would probably have held, that as the plaintiff had allowed this defence to remain on the record, without adopting the course which the Act of Parliament prescribes for setting it aside if uncertain, it should be taken, in order to support the pleading, that the order was one in pursuance of the Act of Parliament, in every respect but this, that the Justice had not the jurisdiction to make it. So it would be upon demurrer. How would it be upon the trial? I do not see how the Judge could refuse evidence to show that the defendant had made two mistakes: first, that he mistook the case to be one in which he might issue a warrant to arrest; and, secondly, that he made a misprision in not entering the order in the order-book. That would plainly not be an order in pursuance of the Act of Parliament. There is an ambiguity in this pleading, with respect to the nature of the order made by the defendant, and we are bound to see that the parties shall not be embarrassed, or the Court perplexed, as would be the case if the pleading were left unreformed. It is not merely for the benefit of the plaintiff that the Court should apply this jurisdiction. It is also in mercy to the defendant, because such a course is calculated to produce the result which, in the case I have mentioned, *Lawrenson v. Hill*, has already happened—an abortive trial, and then a second trial, involving the parties in considerable delay and expense.

Their Lordships then made an order directing the defence to be amended in certain particulars.

(a) 7 Ir. Com. Law Rep. 75.

M. T. 1859.
Queen's Bench

ARCHIBALD DENNISTON, EXOR. of JAMES DENNISTON,
 v.
 WILLIAM DIGAN.

(*Queen's Bench.*)

Nov. 10.

MOTION to set aside defences as embarrassing, and as not being contemplated by the statute.—Action to recover £439. 9s. 0d., for the use and occupation by the defendant of a dwelling-house, mills, and concerns of said James Denniston. The particulars indorsed were:—"May, 1st 1854. To use of the within-mentioned premises, "from 25th of March 1853 to 1st of May 1854, at the rate of £400 "per annum, £489. 9s. 0d." To this the defendant pleaded, secondly:—That the plaintiff's claim is for the use of the said premises, from the 25th day of March 1853 to the 1st day of May 1854; and the defendant says that, before the said 25th day of March 1853, the defendant, being then tenant to the said James Denniston, of the said premises, under a parol demise, agreed with the said James Denniston to buy of him, and the said James Denniston then and there agreed with the defendant to sell him all the estate and interest of the said James Denniston in the said premises, upon the following terms, that is to say, £3250 to be paid by the defendant on the perfecting the deed of sale; and the rent of the said premises to be settled by the defendant up to the 25th day of March 1853: and the defendant says that afterwards, on the 1st day of May 1854, the defendant did, in pursuance of said contract, pay the said sum of £3250, and settled the said rent up to the said 25th day of March 1853; and the said deed of sale was then and there perfected, and the said James Denniston then and there accepted such payment and settlement, and executed the said deed: and the defendant says that it was under said contract, and not as tenant, that he used and occupied said premises during the time for which the plaintiff makes his claim as aforesaid.

To an action for use and occupation, the defendant pleaded, secondly, that before the 25th of March 1853, the defendant, being then tenant to the plaintiff's testator, of the said premises, under a parol demise, agreed to buy, and said testator agreed to sell, said testator's interest in the premises for "£3250, to be paid on the perfecting the deed of sale; and the rent of the premises to be settled up to the 25th of March 1853."

Averment—that on the 1st of May 1854, in pursuance of the agreement, the £3250 was paid, the rent settled up to said 25th of March 1853, and the deed of sale perfected, and

that plaintiff's testator accepted such payment and settlement, and executed said deed. Averment—that it was under said contract, and not as tenant, that defendant used and occupied.

The defendant also pleaded, thirdly, by way of equitable defence, that, during the period in respect of which the plaintiff made his claim, he held and dealt with the premises, to the knowledge of plaintiff's testator, not as tenant, but as equitable owner under the contract mentioned in the preceding defence; and that said contract was afterwards carried into effect, and all claims in respect of said premises determined by the payment of the purchase-money and the settlement of the rent up to a certain date by the defendant, and by the conveyance of said testator's estate and interest to the defendant. The Court refused, with costs, an application to set aside the second defence as embarrassing, and to set aside the third defence as not being within the provisions of the Common Law Procedure Act 1856.

M. T. 1859.
Queen's Bench
 DENNISTON
 v.
 DIGAN.

Thirdly: and for a defence on equitable grounds, the defendant says, that the plaintiff's claim is for use of said premises, from the 25th day of March 1853 to the 1st day of May 1854; and the defendant says, that he, during that period, held, and, to the knowledge of the said James Denniston, dealt with the premises not as tenant, but as equitable owner thereof, under a contract, whereby the defendant agreed to buy from the said James Denniston, and the said James Denniston agreed to sell to the defendant, all the estate and interest of the said James Denniston in the said premises, upon the terms in the last preceding defence mentioned: and the defendant says, that the said contract was afterwards carried into effect, and all claims in respect of said premises determined by the payment of the purchase-money, and the settlement of the said rent up to the 25th day of March 1853, by the defendant, and by the conveyance of the said estate and interest by the said James Denniston to the defendant.

Chatterton (with him *G. Cree*), for the motion, contended that the second defence was uncertain and double, and that it was not possible to say whether it was pleaded as an implied surrender by operation of law, *Doe d. Gray v. Stanion* (a), or as an accord and satisfaction after the rent accrued on the existing tenancy, in pursuance of the previous agreement. As to the third defence, he contended that this was not a case in which a Court of Equity would grant a perpetual injunction, without imposing upon the defendant the terms of paying interest on the purchase-money, from the time when the plaintiff was ready to make a good title. It would also involve an inquiry into the title, and when it was complete.

C. Barry, contra, contended that the defences truly stated the facts as they occurred. It was only in cases where matters of account were involved, or when any thing remained to be done through the machinery of the Court of Law, that an equitable defence was not allowed to be pleaded. *Doe d. Gray v. Stanion* was distinguishable, the agreement there having being merely equitable and never carried into effect. *Daniels v. Davison* (a) would seem to conflict with *Doe d. Gray v. Stanion*.

Cree, in reply.

Daniels v. Davison is distinguishable from *Doe d. Gray v. Stanion*; Lord Eldon's observations in that case being a mere dictum, not necessary to the decision of the case, questioned in *Sug. Ven. and*

(a) 1 M. & W. 695.

(b) 16 Ves. 252.

Pur., p. 148, 13th ed. Lord Eldon's observations were confined to the effect that a contract by a landlord with a tenant in possession would have upon the interests of third parties; but did not state that it would have any effect in altering the position of the parties as between themselves. That was a case in Equity, whereas the question on the second defence here is purely a legal one.

M. T. 1859.
Queen's Bench
 DENNISTON
 v.
 DIGAN.

LEFROY, C. J.

This is an application to set aside two defences; the one, a legal defence, upon the ground that it is embarrassing; the other, an equitable defence, as not falling within the provisions of the Common Law Procedure Act 1856. This application is made under a statute which, as it has abolished what are called technicalities, at the same time makes provision that whilst latitude is given to a party to state his defence in his own way, he shall not state it so as to embarrass his opponent. It is our duty to carry out this Act of Parliament, as far as possible, in accordance with the intention and spirit of it; which are, in so allowing the parties to state their case in their own way, to do equal justice to them both; for, as it enacts that the plaintiff, in availing himself of this latitude, shall not embarrass the defendant, so, it equally enacts that the defendant, in taking advantage of that same latitude, shall not, thereby, be enabled, on his part, to embarrass the plaintiff. In this case, the plaintiff has had the benefit of the latitude of language afforded him by the statute, and is not required to give his action any technical name. He states in his summons and plaint, that a certain sum of money is due in respect of the use and occupation, by the defendant, of certain lands and tenements, by the permission of the plaintiff's testator. The defendant says, "I did not occupy the lands and tenements in the way you state, but I did occupy them" under a contract which he states, and which, if true, does, as he insists, exempt him from liability to the rent claimed by the plaintiff. The objection made by the plaintiff to that defence is, that the defendant has not given it a legal and technical name; he does not say whether that defence is pleaded by way of accord and satisfaction, or as an implied surrender by operation of law. There is no embarrassment, that I can see, nor can any injustice be done to the plaintiff by the defendant not giving this defence a technical name. In my opinion, therefore, in which, I believe, the other Members of the Court concur, this second defence is not embarrassing. Then with respect to the third defence, the equitable defence; there may be a question whether, properly and strictly speaking, it amounts to an equitable defence. The case of *Doe d. Gray v. Stanion*, referred to by the plaintiff, is not so clear as

M. T. 1859.
Queen's Bench
DENNISTON
v.
DIGAN.

to authorise us, upon a motion like the present, to say that this defence is unwarrantable. The plaintiff, if he still consider the defence objectionable, may demur to it, thereby affording to the Court a more favourable opportunity of judging of the validity of the defence, and being enabled himself to carry the case farther, should he think fit so to do. We, therefore, refuse the application with respect to both these defences, and with costs.

PERRIN, O'BRIEN and HAYES, JJ., concurred.

KENNEDY v. VERDON.*

Nov. 25.

Action on a bill of exchange, by indorsee against acceptor.—Defence, traversing the acceptance. Leave given to the plaintiff to reply, first, that the acceptance was the defendant's acceptance; and, secondly, that the defendant represented that the bill was genuine, on the faith of which representation the plaintiff cashed the bill.

MOTION for leave to file two replications, which HAYES, J., in Chamber, had directed to be moved before the Court.—This was an action on a bill of exchange, by indorsee against acceptor; the defence traversed the acceptance. It was alleged that the drawer of the bill, who indorsed it to the plaintiff for full value, had forged the acceptance and afterwards absconded.

W. J. Sidney applied, on notice, for leave to reply, first, that the acceptance in the plaint stated was the acceptance of the defendant; and secondly, that the defendant, in answer to an application made to him on the part of the plaintiff, stated that the said acceptance was the acceptance of the defendant, and that the plaintiff was induced by that representation to cash the said bill. Counsel contended that the facts set forth in the second replication constituted an estoppel *in pais*, and that, unless such facts were put in issue, by way of replication, the plaintiff would be precluded from relying on the estoppel at the trial: *Nowlan v. Gibson* (a).

B. Stephens opposed the motion, and contended that the replications were unnecessary, citing *Cooper v. Le Blanc* (b).

Motion granted, with leave to the defendant to rejoin or demur, as he might be advised.

(a) 12 Ir. Law Rep. 8.

(b) 2 Stra. 1051.

* Before the Full Court.

H. T. 1860.
Queen's Bench.

BOURKE v. MURRAY.*

Jan. 12.

MOTION on behalf of T. Bourke, the nominal plaintiff, that all further proceedings in this cause should be stayed, and that the summons and plaint should be set aside, on the ground that the same was issued, and the plaintiff's name used therein, without his consent or authority, and notwithstanding his having cautioned the attorney against so doing. The costs were also sought by the notice of motion, personally against the attorney who issued the summons and plaint.

MOTION on behalf of the defendant, for the costs which he had been put to in consequence of the issuing and service of the writ of summons and plaint, and that the same should be paid personally by the attorney who issued the writ.

It appeared by the affidavits that this was an action of covenant for rent. That lands held for lives had been devised by will to three trustees (of whom J. Bourke, the father of the nominal plaintiff, was the survivor), their heirs and assigns, upon trust to lease the same in the manner directed by the will, and at the rent therein mentioned. That the will contained various limitations of the rent to be reserved by such lease. That, in the year 1854, John Bourke, who was then the sole surviving trustee, made a lease, pursuant to the trusts of the will, to the defendant, reserving the rent to the lessor and his heirs. The defendant duly paid the rent to the lessor, during his lifetime, and received receipts from him, but never dealt with any of the *cestuis que trust*. That J. Bourke died in 1859, and that T. Bourke, the nominal plaintiff, who was his eldest son and heir-at-law, refused in any manner to act or interfere in the trust, or to accept the rent from the defendant. That in 1859, Elizabeth Healy, claiming to be equitably entitled to the rent, required the defendant to pay it to her, which he declined to do, being apprehensive, as he alleged, that there were rival equitable claimants for the rent; but that the defendant offered to pay the rent to T. Bourke, the nominal plaintiff, or to any person whose receipt would effectually discharge him therefrom. That the attorney for Elizabeth Healy informed T. Bourke of his intention to use the plaintiff's name in an action of covenant, on behalf of Elizabeth Healy, for the rent under the lease of 1854, from

An action having been brought in the name of the heir-at-law of the surviving trustee of a will, to recover rent under a lease made by such trustee, reserving the rent to himself and his heirs, notwithstanding that the heir-at-law had refused to interfere in the trusts, and had expressly cautioned the attorney against using his name. The Court, although an indemnity against the costs of the action had been offered, set aside the summons and plaint, and ordered the costs, both of the heir-at-law and the defendant, to be paid by the attorney who issued the plaint.

* Coram LEFROY, C. J. and O'BRIEN, J.

H. T. 1860.
Queen's Bench.

BOURKE
v.
MURRAY.

the death of J. Bourke, and at the same time offered T. Bourke an indemnity against the costs of such action. That T. Bourke, who was in ill health, refused to allow his name to be used in such action, and cautioned the attorney against doing so; but the attorney, notwithstanding, issued the summons and plaint in the name of T. Bourke, and served the same on the defendant.

Collusion between T. Bourke and the defendant was charged by the affidavit of Elizabeth Healy, but was positively denied by the affidavits of T. Bourke and the defendant.

The motions having come on before a Judge in Chamber, on the 17th of December 1859, he directed that they should be moved before the Court, and for that purpose extended the time for the defendant to plead.

J. Clarke (with him *Exham*), for the first motion. There is no authority in which, under the circumstances of the present case, a party has been compelled to allow his name to be used: *Sullivan v. Sullivan* (a).

E. Sullivan and *O'Riordan*, contra.

Orchard v. Coulsting (b) is precisely in point. The heir-at-law of a deceased trustee is, as to freehold lands, in the same position as the executor of a deceased trustee is as to chattel property.—[O'BRIEN, J. An executor, by proving the will, does a substantive act to constitute himself the representative of the testator; but an heir-at-law can do no act to disclaim an estate which descends to him.—LEFROY, C. J. This trust is a continuing one. Is there any authority in which it has been held that the heir-at-law of a trustee, who refuses to interfere in the trust, has been compelled to allow his name to be used in an action of covenant?—There is no express authority; but, on principle, *Orchard v. Coulsting* governs the present case.

Exham was not called on to reply.

LEFROY, C. J.

In this case the Court is called upon to force the heir-at-law of a trustee, against his will, to allow his name to be used as plaintiff in an action of covenant for rent, where the trust is a continuing one, and where, if there be any dispute as to the party entitled to this rent, the right to it cannot be determined by this action. No

(a) 6 Ir. Com. Law Rep. 523.

(b) 6 Scott, N. S., 843.

authority has been cited to establish such a proposition. The H. T. 1860.
Trustee Acts were passed to meet such cases, amongst others. *Queen's Bench.*

Motion granted, with costs to be paid personally by the
attorney who issued the plaint.

BOURKE
v.
MURRAY.

W. M. Johnson (with him *R. Armstrong*), then moved the second motion.

E. Sullivan and *O'Riordan*, contra.—[O'BRIEN, J. The defendant has no other means of recovering the costs which he has been put to, but by the motion].

Motion granted.

NOTE.—In addition to the cases cited, see where the action has been allowed to proceed: *Emery v. Mucklow* (10 Bing. 23; S. C., 3 M. & Sc. 384; 2 Dow. 735); *Anster v. Holland* (15 L. J., Q. B., 229); *Spicer v. Todd* (2 C. & J. 165; S. C., 1 Dow. 306, 2 Tyr. 172); *Whitehead v. Hughes* (2 Dow. 258). Where the proceedings were stayed: *Doe d. Prosser v. King* (2 Dow. 580); *Doe d. Hemmek v. Fillis* (2 Chit. Rep. 170); *Montgomery v. Montgomery* (6 Ir. Com. Law Rep. 522). On the application of defendant: *Hubbart v. Phillips* (13 Mees. & W. 702); *Doe d. Shepherd v. Roe* (2 Chit. Rep. 171). See as to the liability of a defendant paying money to an attorney suing without authority, *Robson v. Eaton* (1 T. R. 62). See, also, *Rogers v. Kelly* (2 Camp. 123). See, as to the motion generally, 2 *Archb. Prac.* 9th ed., pp. 955, 1300; *Lush's Prac.*, 2nd ed. pp. 181, 186; *Cole on Ejectment*, pp. 75, 94, 357.

M. SALAMAN v. ISABELLA J. DONOVAN.*

Jan. 13.

MOTION to make absolute a conditional order of the 24th November 1859, directing the Governor and Company of the Bank of Ireland to pay to the plaintiff the sum of £53. 8s. 5d., which had been paid by them to the Sheriff of the county of Dublin, pursuant to an order of the Court of Common Pleas, of the 10th November 1859, and made in the cause of *Davis v. Donovan*. It appeared by the

When a judgment creditor obtains a charging order, under section 132 of the Common Law Procedure Act 1853, attaching the

dividends of stock in the books of the Bank of Ireland, which order is duly served upon the Bank, the Bank will be held responsible, if it pay such dividends to another judgment creditor, who, subsequently to the date of such charging order, has obtained, in a different Court, not only another charging order attaching, but also an absolute order for the payment of such dividends.

* PERRIN, J., *absente*.

H. T. 1860.
Queen's Bench.
SALAMAN
v.
DONOVAN.

affidavit for cause, that the plaintiff, in Easter Term 1859, obtained a judgment against the defendant, who was entitled to a life interest in the sum of £1850, New £3 per cent. stock, standing in the names of trustees in the books of the Governor and Company of the Bank of Ireland. That the plaintiff obtained a charging order in this Court, on the 8th July 1859, by which it was ordered that whatever interest the defendant in the cause of *Salaman v. Donovan* might have in the dividends *accruing* on the said stock should stand charged with the payment of the said judgment debt, *until further order*. This order was served upon the Bank, on the 11th July 1859. No cause was shown against this order, by any person interested, pursuant to the Common Law Procedure Act 1853, s. 133. By an order of the Court of Common Pleas, of the 10th of October 1859, in the cause of *Davis v. Donovan*, the said sum of stock was attached to answer the amount due to the plaintiff in that cause, on foot of a judgment obtained by him against the defendant. This order was served upon the Bank in October 1859. By a conditional order of the 3rd November 1859, made in the same cause, the annual dividends in said sum of stock were ordered, from time to time, to be paid, by the Governor and Company of the Bank of Ireland, to the Sheriff of the county of the city of Dublin, in discharge of the amount due to the plaintiff in said cause. This order was made absolute upon the 10th November 1859; and on the 12th November 1859, the sum of £53. 8s. 5d., being the dividend for one year upon said sum of stock, was accordingly paid to the Sheriff by the Bank of Ireland. By an order of the 12th November 1859, made in the cause of *Salaman v. Donovan*, the Governor and Company of the Bank of Ireland were ordered to pay to the Sheriff of the county of the city of Dublin the sum of £53. 8s. 5d., the dividends due upon said sum of stock, up to the 10th October 1859, to answer in part payment of the plaintiff's judgment debt. This order was served upon the Bank on the 14th November 1859; and in the same month the Sheriff having required the Bank to pay said dividends, the Bank declined to do so, having previously paid them under said order of the 10th October 1859. By a conditional order of the 24th November 1859, made in the cause of *Salaman v. Donovan*, the Governor and Company of the Bank of Ireland were ordered to pay to the plaintiff the sum of £53. 8s. 5d., for the dividends so paid over to the Sheriff as aforesaid. This order was served upon the Bank on the 25th November 1859.

J. Clarke (with him *Hemphill*), for the motion.

The moment the order of the 8th July was served upon the Bank, the dividends became attached in their hands to answer the purposes of

the execution of the party on whose behalf it was obtained ; and by the express terms of the order of attachment made under section 132 of the Common Law Procedure Act 1853, the Governor and Company of the Bank of Ireland are ordered and required not to suffer the dividends, or any part thereof, to be transferred, paid or dealt with, until further order ; and, although the order of the 8th July is not in these exact terms, yet it is sufficient to have put the Bank upon their guard.—[LEFFROY, C. J. In the Court of Chancery, the wording of the order was “until further order;” if any other order were subsequently made, the fund would not have been paid out, until such further order had been made. If the order of the Court of Chancery had such a restraining effect upon any dealings with a fund, surely the terms of this Act of Parliament are not less effective.]—The Bank are bound to make a memorandum, in the margin of their books, of all the orders affecting the stock, &c., in such books ; and yet, with this order of the 8th July before their eyes, they pay these dividends away, in direct violation of the Act of Parliament. There is no laches on the part of the plaintiff in this cause.—[LEFFROY, C. J. Does not the language of the order of the 8th July limit your claim to the dividends which have accrued due from that date? The terms of it are, “It is ordered that whatever interest the defendant may have in the “dividends *accruing* upon the said stock,” &c. It appears to me, that dividends which *accrued* before the 8th July do not fall within those terms.]—The intention of the order was clearly to attach not only the accruing, but the past dividends ; and the language of the order is sufficient to enable the Court to carry out that intention.—They cited *French v. Balfe* (a) ; *In re Dunscombe* (b), and *Warren v. Wyse* (c).

H. T. 1860.
Queen's Bench
 SALAMAN
 v.
 DONOVAN.

Sergeant *Fitzgibbon* (with him *W. F. Darley*), contra.

It is clear that, by the terms of the plaintiff's own order of the 8th July, he can only attach the dividends which accrued since that day. If the effect contended for by the other side be given to an order of attachment, then the party who has obtained it may lock up the fund, and, during his pleasure, prevent any other creditor, no matter how diligent he be, from proceeding against such fund.—[LEFFROY, C. J. Is there no time limited by the Act, within which the party having obtained the order of attachment must put it in motion?—No ; and the only remedy the other

(a) 6 Ir. Chan. Rep. 63.

(b) 9 Ir. Eq. Rep. 4.

(c) 4 Ir. Com. Law Rep. 235.

H. T. 1860.
Queen's Bench.

SALAMAN
v.
DONOVAN.

creditors have would be to apply, under section 133 of the Common Law Procedure Act 1853, to have such order discharged or varied. When the Bank pays dividends, or transfers a fund in obedience to an order of a Court of Law, under the Common Law Procedure Act 1853, section 133 of that Act completely indemnifies them. Further, the order of the 8th of July, although purporting to be an absolute order, is in reality only conditional; and the Master of the Rolls held, in *French v. Balfre* (a), that such order does not attach the fund until made absolute. Here, Salaman took no step to make the order of the 8th of July absolute, until the 24th of November last, and in the meantime another creditor has taken all the steps to make his order fully available; is that creditor to lose the benefit of his diligence, or the Bank to be made responsible for acting upon such order? The plaintiff, having asked, by his conditional order of the 24th of November 1859, for more than he has a right to, must abide by that order, and, therefore, is not entitled to anything.

Hemphill replied.

LEFROY, C. J.

The Governor and Company of the Bank of Ireland having been apprised, by the terms of the order of attachment, of the 8th of July, of their duty, with respect to the dividends of the fund, and having, in the present instance, disregarded that duty, they must bear the consequences of having done so. We think, however, that justice may be done to the parties in this way—by giving to the plaintiff Salaman, who obtained this restraining order of the 8th of July, the dividends to the extent claimed by that order, viz., the dividends which were accruing at the date of that order. He has claimed the dividends which accrued before the date of that cautioning order upon the Bank; but we conceive we should not be acting in accordance with the justice of the case, did we give him more than his order imports. It has been objected, however, that we should award him nothing at all, because, by the conditional order of the 7th of November, having required payment of the entire sum of £53. 8s. 5d., which is more than by the terms of his charging order he is entitled to, he must stand or fall by his conditional order. As, however, our object is to do justice between the parties, we cannot accede to that objection, but will give the plaintiff the dividends which have accrued since the 8th of July.

(a) *Supra.*

This is a case in which we think we should not give costs to either side; the one asked for more than he ought to have asked for, the other contended that the plaintiff should get nothing at all. Each side, therefore, is in fault and must bear their own costs.

H. T. 1860.
Queen's Bench.
 SALAMAN
 v.
 DONOVAN.

RICHARD SMITH v. PETER WHELAN.*

Jan. 20.
 Feb. 3.

MOTION to set aside the second and third defences as embarrassing. The second count of the summons and plaint stated that the plaintiff, being then in the employment of the defendant, the defendant unlawfully and maliciously, and without any reasonable or probable cause, gave the plaintiff in charge to a police-man for being drunk, and caused him to be imprisoned in the police station-house at, &c.; of which charge, upon inquiry before a Magistrate, the plaintiff was adjudged not guilty. The third count alleged that the defendant had summoned the plaintiff before a Magistrate, on a charge of being drunk and disorderly in the defendant's service, of which charge the plaintiff was adjudged not guilty. To the second count the defendant pleaded that he did not do or commit all or any of said acts maliciously, and without reasonable and probable cause, as alleged. The defence to the third count was in precisely the same terms.

J. White (with him *W. Ryan*), for the motion.

The defences to the second and third counts of the summons and plaint are double, and put in issue two matters, either of which would be an answer to the action. *Darnley v. Lipscombe* (a) shows that such defences are bad, as putting in issue both the acts and the motive. The same point has been also decided in *Brennan v. Williams* (b).—[HAYES, J. If the defendant separates his defences, then the plaintiff knows to which of them he is to apply himself; but, if he bundle them together, then the plaintiff must go to trial prepared to prove the entire case; and at the trial the defendant may say, "I admit the acts, but I deny that my motives were such

To a count "that the defendant maliciously, and without any reasonable and probable cause, gave the plaintiff in charge to a police-man, and caused him to be imprisoned, &c.," the defendant pleaded, "that he did not do or commit all or any of the said acts maliciously, and without reasonable and probable cause, as alleged."

Held, following *Brennan v. Williams* (9 Ir. Com. Law Rep., App., xxxv), that this defence was embarrassing, as putting in issue both the committing of the acts and also the want of reasonable and probable cause.

The police charge-sheet,

summons and police-office report of charges, are records the production of which, on a trial for assault and false imprisonment, may be obtained by a notice under the 73rd General Order of January 1854.

(a) 4 Ir. Jur., N. S., 32.

(b) 9 Ir. Com. Law Rep., App., xxxv.

* PERRIN, J., *absente*.

H. T. 1860.
Queen's Bench.
 SMITH
 v.
 WHELAN.

as are alleged by the plaintiff." It is analogous to pleading in slander, in which the defendant pleads, first, that he did not speak the words, and, secondly, that he did not speak them in the slanderous sense imputed.]

W. J. Sidney, contra.

These defences are good, and within the principle of the decision in *Winton v. Moore* (a). They are also in conformity with *Cantwell v. Cannock* (b), which is approved of in *Darcy v. Cahill* (c). In *Cotton v. Browne* (d), it was held that it was sufficient to plead not guilty to an action for maliciously indicting the plaintiff, without probable cause; and a special plea that the defendant had probable cause was struck out. The plaintiff is not embarrassed; an issue can be easily taken upon these defences, which is always the test in such cases. If the defendant is obliged to take issue both as to the acts and the motive separately, although he should prove that he did not act maliciously, and without reasonable and probable cause, and so entitle himself substantially to the verdict, yet the separate issue on the committal of the acts may be found against him; and the defendant may thus be put to the cost of that issue.

LEFROY, C. J.

Having regard to the object of the Common Law Procedure Act 1853, and the principles by which we should be guided in carrying out that Act, and also having regard to the very recent decision of the Court of Exchequer, in *Brennan v. Williams*, and considering how desirable it is that uniformity should exist in all the Courts upon this subject, we are of opinion that these defences, as they stand, are objectionable. I have a perfect recollection of the case of *Cantwell v. Cannock*; but, so far from it being a decision of this Court, upon the question now before us, we settled the issues by consent, in order to enable the parties to go to trial upon the facts of the assault and imprisonment, and upon the question of reasonable and probable cause, in the defendants' prosecution of the plaintiff. The defendant should deny the acts complained of, in a separate defence, and then, by a distinct traverse, put in issue the question of reasonable and probable cause, admitting the committing of the acts. Nor is there any inconsistency in his thus pleading, as thereby he has an opportunity of going to trial upon the issues knit as to the acts complained of; or he may abandon those, and go to trial

(a) 8 Ir. Com. Law Rep. 234.

(b) 3 Ir. Com. Law Rep. 78.

(c) 6 Ir. Com. Law Rep. 121.

(d) 13 Ad. & Ell. 312.

upon the issues raising the questions of reasonable and probable cause. We are, therefore, of opinion that this form of defence is bad, as being a violation of the Act of Parliament, which expressly prohibits the traversing, and at the same time the confessing and avoiding, of the same subject-matter in the same defence.

H. T. 1860.
Queen's Bench.

SMITH
v.
WHELAN.

O'BRIEN, J.

These defences are clearly embarrassing, and open to the objections taken to them ; because, as they at present stand, the plaintiff would be obliged to go down to trial prepared to prove the commission of all the acts complained of, which the defendant, at the trial, may abandon, and say that he only defends his motives in the commission of those acts.

Liberty given to amend, the costs to be plaintiff's costs in the cause.

NOTE.—*T. White*, on behalf of the plaintiff, now moved, pursuant to the 73rd General Order of January 1854, for an order on the proper officer of the Metropolitan Police of the Dublin district, for the production, on the trial of this cause, of the following documents, viz :—Police-office report of charges in F division, of 23rd and 24th days of August 1859, at Kingstown ; the summons and police charge-sheet, which were then respectively in the possession of the clerk of the Police division of Kingstown.

Feb. 3.

CHRISTIAN, J.,* granted the motion, and directed a *subpoena duces tecum* to issue, directed to the clerk of the Police division, Kingstown, and to two inspectors and an acting inspector of police, who were named in the order, to attend on the trial, at the ensuing After-sittings, and to produce the originals of the above documents.

* *Coram* CHRISTIAN, J., sitting in the Consolidated Chamber.

PHIBBS, *Appellant*, v. KEARNS and another, *Respondents*.

Jan. 26.

MACDONOGH in this case had obtained a conditional order, on a day this Term, to erase the names of the respondents from the burgess-roll of the borough of Sligo, pursuant to the 3 & 4 *Vic.*, c. 108, s. 49. Affidavits were filed, and notice of motion to show cause served, by the respondents, within the time limited in the conditional order ; but cause not having been shown, the appellant served

On the Crown side, if notice to show cause against a conditional order is served within the period named in such order, the party showing cause is enti-

led to move ; but if such notice is not served within that period, then, whichever party, whether prosecutor or defendant, first serves notice of motion is entitled to move.

H. T. 1860. notice of motion to make the conditional order absolute, notwithstanding the affidavits for cause. A question now arose as to which side had the right to move.

Queen's Bench.
PHIBBS
v.

KEARNS.

Macdonogh and Hemphill, for the appellants.

Sir C. O'Loghlen and Harkan, for the respondents.

LEFROY, C. J.

We are informed by our officer that the practice of the Court on the Crown side is, that if the respondents have served notice of motion to show cause, within the period named in the conditional order, they are entitled to move; but if such notice is not served within that period, then the party, whether appellant or respondent, who first serves notice of motion is entitled to move. In the present case, therefore, the respondents are entitled to begin.

NOTE.—For the practice on the Civil side, see 134th General Order, January 1854.

STOKES v. HARTNETT.*

Jan. 30.

A defence of payment, to an action of ejectment for non-payment of rent, set aside as false; it appearing, by the contradicted affidavit of the plaintiffs, that the rent had not been paid and was still due.

MOTION to set aside a defence as false, and what is commonly called a sham plea.

This was an ejectment for non-payment of rent, to which the defendant pleaded that he had paid the rent claimed on a particular day, which he specified. It appeared by the joint and several affidavit of the three plaintiffs, that the rent had not been paid and was still due and in arrear. The defendant made no affidavit in reply to the plaintiffs' affidavit.

W. Hickson, for the motion, cited *Richley v. Proone* (a), and *Leathley v. Carey* (b).

Raymond, contra, contended that the defence was one upon which issue could be taken, and that the Court would not try the truth of a plea on affidavit.

(a) 1 B. & C. 286.

(b) 8 Ir. Com. Law Rep., App., i.

* Coram LEFROY, C. J. and O'BRIEN, J.

LEFROY, C. J.

No affidavit has been made by the defendant, and the plaintiffs' affidavit being unanswered, the defence must be taken to be false and sham, and it must therefore be set aside.

Conditional order granted to set aside the defence, with costs, unless cause shown within six days.*

* NOTE.—No cause was shown.

H. T. 1860.

Queen's Bench.

STOKES

v.

HARTNETT.

TULLY v. ROACH.*

Jan. 30.

MOTION to set aside an equitable defence as embarrassing, as not answering the whole of the plaintiff's demand, as not applicable to the cause of action to which it was pleaded, and as not constituting a defence in equity.

This was an action of trespass for mesne rates, in the ordinary form, alleging that the plaintiff had sustained £10 damages by the trespasses, and had been obliged to expend £10. 15s. 1d. in recovering the possession of the premises, and praying judgment for £20. The defendant pleaded two defences: first, by way of equitable defence, that the plaintiff, at the commencement of this suit, was, and still is, indebted to the defendant in an amount equal to the plaintiff's claim, for that the damages sustained by the plaintiff were of the value of £1. 10s., and no more; and defendant saith that, on the 15th of September 1857, the defendant became tenant from year to year to the plaintiff, for a house in Tuam, on the following terms; that is to say, the rent to be a yearly rent of £2, to be paid in advance by the defendant to the plaintiff, upon his getting possession thereof for one year, up to the 15th of September 1858; that the defendant was to be allowed or to be paid by the plaintiff for all repairs properly and necessarily to be done and expended upon the said house, whilst the defendant was tenant thereof; and defendant saith that said house was out of and needed necessary repairs; and that, in pursuance of said agreement, the defendant paid the sum of £2, in advance, for the rent which would accrue

The defendant, in September 1857, became tenant from year to year, of a house, to the plaintiff, at the rent of £2 yearly, in advance, and upon the terms that he should be paid or allowed by the plaintiff for all necessary repairs, which he should do to the house whilst such tenant. The defendant paid one year's rent in advance, and expended £3. 10s. in repairs, but was served with a notice to quit in September 1859, by the plaintiff, who subsequently brought an ejectment against the defendant,

who allowed judgment to go by default. The plaintiff having brought an action for mesne rates, the defendant pleaded these facts, and giving the plaintiff credit for £2 (the year's rent up to September 1859), out of the £3. 10s., offered to set-off the residue (£1. 10s.) against the plaintiff's damages, which were averred in the defence to be £1. 10s., and no more.

Motion to set aside this equitable defence refused with costs.

* *Coram* LEFROY, C. J., and O'BRIEN, J.

H. T. 1860.
Queen's Bench.
 TULLY
 v.
 ROACH.

due on said house, up to the 15th of September 1858, upon his getting possession thereof; and that, in further pursuance of the said agreement, and whilst the defendant was tenant as aforesaid, and before the service of the notice to quit, hereinafter mentioned, defendant expended, in necessary repairs on the said house, the sum of £3. 10s.; and that, subsequently to the said outlay, expenditure and repairs, the plaintiff caused the defendant to be served with notice to quit said house, on the 15th of September 1859; and that defendant, on the said day, became and was entitled to receive from the plaintiff the said sum of £3. 10s., minus the sum of £2, due by the defendant to the plaintiff, for the rent of the said house, up to the said 15th of September 1859, leaving the said sum of £1. 10s. due by the plaintiff to the defendant, for such repairs as aforesaid; which said sum of £1. 10s. defendant is ready to set off against plaintiff's claim, the particulars of which are indorsed hereon; and defendant saith, that the said house and the messuage and premises in the summons and plaint mentioned are one and the same, and not other or different.

The second defence traversed the trespasses in the plaint complained of.

B. Beytagh, for the motion.

The set-off which is relied upon in this defence is a set-off of unliquidated damages. Set-off cannot be pleaded in an action of tort, it is applicable only to the case of mutual debts. The doctrine of set-off is the same in Equity as at Law, unless there is something inequitable in the conduct of the parties: *O'Connor v. Spaight* (a); *Beaseley v. Darcy* (b); *Rawson v. Samuel* (c). But an account of the money expended by the defendant must, in any case, be taken; and this equitable defence, therefore, cannot stand: *Collis v. Pendergast* (d). The plaintiff is precluded from demurring, because, by doing so, the truth of the defence would be admitted; in the defence the plaintiff's damage is assessed at £1. 10s., which is untrue, the costs of the ejectment alone being £10. 15s.

Concannon, contra.

The defendant has a cross-claim against the plaintiff, for money expended on the premises, pursuant to an agreement between the plaintiff and defendant; and even if the plaintiff is not entitled at Law to set off this cross-claim, he is, at all events, entitled to do so

(a) 1 Sch. & Lef. 309.

(b) 2 Sch. & Lef. 493.

(c) Cr. & Ph. 161.

(d) 7 Ir. Com. Law Rep. 542.

in Equity : Earl Cawdor v. Lewis (a). He is, therefore, entitled to rely upon it by way of equitable defence: *Cole on Ejectment*, p. 639. The conduct of the plaintiff, in serving notice to quit after the repairs were executed, with a view to prevent the defendant from having the benefit of the sums expended by him in the repairs, entitles the defendant to relief in Equity, irrespective of the principle decided in *Earl Cawdor v. Lewis*. The costs of the ejectment are special damage, and cannot, therefore, be traversed: *Custis v. Sandford (b)*. The trespass is the gist of the action, and that is traversed. The equitable defence avers that the plaintiff's damage is £1. 10s., and no more. Issue may be joined upon that fact, and the plaintiff will be entitled to recover any amount which the jury may find in damages for him beyond £1. 10s.

H. T. 1860.
Queen's Bench.
 TULLY
 v.
 ROACH.

Beytagh, in reply.

It is settled that an equitable defence, which involves an account, cannot be sustained: *Ferg. Com. Law Proc.*, 2nd ed., p. 378; and the agreement, which is relied upon in the equitable defence, is, that proper repairs should be executed, and not that any ascertained sum should be laid out.—[O'BRIEN, J. The defence amounts to this, that it was mutually agreed that the plaintiff should pay or allow to the defendant the money expended by him in necessary repairs; that the defendant did execute the necessary repairs, and in doing so expended £3. 10s., of which £1. 10s. is still due. The principle that a defence which involves an account between the parties cannot be pleaded by way of equitable defence, because this Court has no means of taking the account, does not apply where the amount can be found by a jury.]

Per Curiam.

The motion must be refused with costs.

(a) 1 Y. & Coll. 427.

(b) 4 Ir. Com. Law Rep. 197.

NOTE.—See 2 *Story Eq. Jur.*, 5th ed., pp. 893–896.

M. T. 1859.
Common Pleas.

D'ARCY v. HASTINGS.

(*Common Pleas*).

Nov. 2, 15.

Where the plaintiff, in an action of contract, in which he had recovered a sum under £20, had an office within the civil-bill jurisdiction where the defendant resided, but the plaintiff's dwelling-house, where he resided with his family, was in another civil-bill jurisdiction—
Held, that, under the Common Law Procedure Amendment Act 1856, s. 97, the plaintiff was not entitled to costs.

THIS was a motion by way of appeal from the taxation of costs in this suit, of Henry Colles, Esq., Taxing-master, that the taxation of plaintiff's costs might be reviewed, and that the plaintiff might be disallowed any costs of the proceedings in this cause, on the ground that the cause of action arose in the county of the city of Dublin, and that the parties, at the time of bringing said action, and thence hitherto, had resided in said city, and that the plaintiff had recovered, exclusive of costs, a less sum than £20 in this action. The defendant's affidavit stated, that the present action had been brought on foot of a bill of exchange, accepted by defendant, and that the cause of action arose in the city of Dublin; that, at the time of bringing said action, and for a long time previously, the plaintiff carried on business, and had an office for that purpose, which he was in the daily habit of frequenting, at No. 1 D'Olier-street, in said city, and that he had since removed his office to No. 5 in said street, where he then held the same; that defendant had, for many years, and still, resided at No. 16 George's-place, in said city. The plaintiff, in his affidavit, stated that he did not *reside* in No. 1 or No. 5 D'Olier-street, or in any other place in the city of Dublin, nor had he resided therein for the last seven years, but that his usual place of residence, and where he then resided, was at Williamstown-avenue, Blackrock, in the county of Dublin; that he had at No. 1 D'Olier-street, and then had at No. 5 therein, merely an office, which he attended daily, and no residence.

Philip Keogh, in support of the motion.

By the 97th section of the Common Law Procedure Act 1856, "If, in any action of contract, brought after the commencement of this Act, in the Superior Courts (save for breach of promise of marriage), when the parties *reside* within the jurisdiction of the Civil-bill Court of the county in which the cause of action has arisen, the plaintiff shall recover, exclusive of costs, a sum less than £20, the plaintiff, in any such action, shall not be entitled to any costs," unless a certificate be given, or order be pronounced, to the effect that it was a fit action to be tried in the Superior Courts. That section re-enacted the 40th section of the Civil-bill Act, 14 & 15 *Vic.*,

c. 57, which had been repealed by the Common Law Procedure Act 1853, s. 243. There was neither a certificate or order made in the present case. The only question, therefore, is, whether the parties resided within the same civil-bill jurisdiction, within the meaning of the 97th section? The 69th section of the Civil-bill Act enacted, "That no defendant shall be liable to be sued or "proceeded against by civil-bill, under this Act, or obliged to appear, &c., at any Session, &c., to be held out of the division "in which he usually *resides*. Provided always, that if any "person shall have and occupy any house, warehouse, counting-house, shop, factory or office, for the sale of goods, or for carrying "on any business, in any county, he shall be deemed to have a "residence within such county, for the purposes of this Act." The proviso is not limited to the case of defendants, but includes plaintiffs. Had this case arisen under the 40th section of the Civil-bill Act, it is clear that the plaintiff would not be entitled to costs, as having what was equivalent to a residence, within the meaning of the Act. The 97th section of the Common Law Procedure Act revives the repealed enactment, and ought to receive the same construction.—[MONAHAN, C. J. No matter where the plaintiff resides, he may bring an action in the Civil-bill Court against the defendant; but it is plain that the mere circumstance of the plaintiff having power to sue in the Civil-bill Court is not enough to compel him to do so. The question here is, whether the 69th section does not apply only to the case of a *defendant* having a counting-house, shop, &c?—The word "person" in the proviso is sufficiently general to include both parties. Independently of express enactments, place of business has been held to be residence: *Attenborough v. Thompson* (a); *Blackwell v. England* (b).

M. T. 1859.

Common Pleas.

D'ARCY

v.

HASTINGS.

J. W. Sherlock.

Residence means where a man resides with his family. *Moffatt v. M'Ternan* (c) was decided upon the construction of the 40th section. The plaintiff was an attorney, and had a house in Dublin, in which he and his family resided for the greater part of the year, and in which he had been, for several years, in the habit of carrying on his business. He had also a house in the county of Sligo (in which county the defendant resided), in which he and his family resided during a portion of the summer months; but their place of abode during the greater part of the year was in Dublin. It was

(a) 2 H. & N. 559.

(b) 8 E. & B. 541.

(c) 6 Ir. Jur. 177.

M. T. 1859. held, that the plaintiff did not usually reside in the county of Sligo, so as to disentitle him to costs, under the 40th section ; and that, in construing the provisions of this section, the Court might have regard to the provisions of section 65 (which requires that the Assistant-Barrister should be satisfied that the place where the defendant "usually resided" was within his jurisdiction), in order to ascertain the meaning of the word "reside" in the former section: *M'Dougall v. Patterson* (a); *Rex v. The Inhabitants of North Curry* (b).

Common Pleas.
D'ARCY
 v.
HASTINGS.

Keogh, in reply.

[MONAHAN, C. J. Is there any distinction between the case of *Moffatt v. M'Ternan* and the present ?]—It did not appear that the plaintiff there was "usually resident" in the jurisdiction where defendant lived. In the present case, it is otherwise.

The Court having desired that the case should stand over for further argument—

Keogh now renewed the application.

[MONAHAN, C. J. The question is, what sort of residence is required for the petitioner, so as to come within the 97th section ?]—*Butler v. Corcoran* (c) decides that the 97th section of the Common Law Procedure Act is to be construed with reference to the word "reside," by the 69th section of the Civil-bill Act. Greene, B., says there, "I think these two sections, the 69th section of the "Civil-bill Act, and 97th section of the Common Law Procedure "Act 1856, must be read together. Residence should be construed to "mean a place where the civil-bill can be served." The words "any person" in the proviso of the 69th section are general—[BALL, J. That may mean any *such* person as is mentioned in the previous part of the section]—The word in the 97th section is "reside," and not "usually reside," as in the first clause of section 69, which refer to the residence of the defendant. *Moffatt v. M'Ternan* (d) may be easily distinguished.—[CHRISTIAN, J., referred to *Dunston v. Patterson* (e)].

Sherlock, contra.

The 69th section refers solely to the defendant, it being necessary

(a) 21 Law. Jour., N. S., C. P., 21.

(b) 4 B. & C. 953.

(c) 7 Ir. Com. Law Rep. 276.

(d) 6 Ir. Jur. 177.

(e) 5 C. B., N. S., 267.

for the purposes of the Act to define that his place of business should be deemed to be his residence.—[BALL, J. If the other side is right, the proviso in the 69th section extends the enacting part.—MONAHAN, C. J. The present case is within the mischief which the 97th section was intended to prevent].

M. T. 1859.
Common Pleas.
D'ARCY
v.
HASTINGS.

Keogh replied.

MONAHAN, C. J.

We do not entertain any doubt with respect to the present case. If there had been no such section in the Civil-bill Act as section 40, the case would have been different; but where we have section 40 referring to the residence of both parties, we think that it must refer to such residence as is defined by subsequent sections; and as the same words occur in the 97th section of the Common Law Procedure Act, they must be similarly construed. We, therefore, think that, inasmuch as the plaintiff would have been liable to have been sued in the Dublin Civil-bill Court, he should have sued the defendant in that jurisdiction; and is therefore disentitled to the costs of the action.

SEGRAVE v. DUFFY.*

(*Exchequer.*)

H. T. 1860.
Exchequer.
Jan. 25.

THIS was a motion on behalf of the defendant, that the inquiry to ascertain the plaintiff's damages might be sped before the Master of the Court, instead of before the Sheriff.

It appeared that an action had been brought by the plaintiff, for oral slander, and that the venue in the action was laid in the county of the city of Dublin. The summons and plaint was served on the 19th of December; and as the defendant did not take defence, the plaintiff marked judgment by default, on the 10th of January. On the 20th of January, the plaintiff served notice upon the defendant, personally, of speeding a writ of inquiry to ascertain the damages before the Sheriff of the county of the city of Dublin.

Semble.—The jurisdiction of the Sheriff to hold a writ of inquiry for damages, in Dublin cases, is not taken away by the Common Law Procedure Acts 1853 and 1856.

But where, in such cases, a plaintiff proceeds before the Sheriff, the

Court, on the application of the defendant, may order the inquiry to be sped before the Master.

* Before the Full Court.

H. T. 1860. The plaintiff's attorney then lodged with the Sheriff his writ of inquiry, returnable on the 4th of February; and, upon the lodgment, undertook to be personally responsible to the Sheriff for his fees. On the 20th of January he issued subpoenas to the necessary witnesses, for attendance before the Sheriff and his assessor. The defendant then served the above notice.

Eschequer.
SEGRAVE
 v.
DUFFY.

E. P. Levinge, in support of the application, contended that, upon the terms of the 101st section of the Common Law Procedure Act 1853, and 99th section of the Common Law Procedure Act 1856, the Sheriff has no jurisdiction to hold a writ of inquiry, in those cases in which the venue is laid in the county, or county of the city of Dublin.

R. Dowse, contra.

The Sheriff's jurisdiction to hold writs of inquiry is not taken away, even when the venue is in the county, or county of the city of Dublin. The 100th section of the Common Law Procedure Act 1853 enacts that, in default of a defence filed, where the plaintiff's demand is not for a debt or liquidated sum, it shall be lawful for the plaintiff to issue a writ of inquiry to the Sheriff of the proper county. That section, re-enacting in terms the old law, is general, and applies to cases where the venue is in Dublin. Then comes the 101st section, which enables a Court or Judge, where the venue is in Dublin, to direct that, instead of a writ of inquiry to the Sheriff to ascertain the damages, the amount shall be ascertained by the Master of the Court.

Then the 99th section of the Common Law Procedure Act 1856 enacts that, in all cases within the 98th and 101st sections of the Common Law Procedure Act 1853, it shall not be necessary to obtain any order of the Court or Judge for the Master to ascertain the damages, but the Master may do so without any such order. The two Acts are to be read as one, and the result is this—the plaintiff may still issue his writ of inquiry to the Sheriff in Dublin cases. Under the 101st section, he may, if he pleases, obtain an order of the Court to proceed before the Master instead of the Sheriff; and under the 99th section of the subsequent Act, he may so proceed if he pleases, without any order.—[FITZGERALD, B. You say the 101st section leaves the matter dependant upon the plaintiff's option, and that the 99th section leaves him the option, but takes away the necessity for an order].—Yes. Here the plaintiff has exercised that option, and incurred considerable expense before the defendant served this notice of motion.

GREENE, B.

We think that this application ought to be granted, and that the power of the Court to grant it is not taken away by anything in these Acts of Parliament. The plaintiff, certainly, unless the Sheriff's jurisdiction is repealed by the 101st section of the Common Law Procedure Act 1853, and 99th section of the subsequent Act, had a right to do what has been done. The only person who can proceed before the Master, without an order of the Court, is the plaintiff. If he choose to speed his writ of inquiry before the Sheriff, we think, so far as the Court will offer any opinion, that he has a right to do so. Then the defendant applies to have the inquiry sped before the Master. The Court has power to grant such a motion; and we think it reasonable and proper that it should be granted, upon the terms of the defendant paying all costs necessarily and properly incurred up to the service of this notice.

H. T. 1860.

Eschequer.

SEGRAVE
v.
DUFFY.

M. MURPHY, *Appellant*; T. CREEDAN, *Respondent*.

C. HERLIHY, *Appellant*; T. CREEDAN, *Respondent*.

DENIS SHEA, *Appellant*; T. CREEDAN, *Respondent*.

(*Circuit Case*).

1859.

Circuit Case.

March 18.

CIVIL-BILL EJECTMENT on notice to quit.—By the 14 & 15 Vic., c. 57, s. 24, it is directed that five General Sessions of the Peace shall be held yearly, in each of the East and West Ridings of the county of Cork, with power to the Lord Lieutenant in Council to order that the number of Sessions in each Riding shall be reduced to four; and, accordingly, by proclamation, dated the 2nd of August 1856, it was ordered that “Four General Sessions of the Peace,

By the Civil-bill Act (14 and 15 Vic., c. 57, s. 24), five general Sessions of the Peace are to be held yearly in each Riding of the County of Cork. By proclamation,

pursuant to that and the 31st and 32nd sections, it was ordered that four General Sessions of the Peace, and no more, should be held in each Riding, and (amongst others), that, for the Division of Bandon, an October General Quarter Sessions should be held at Bandon, adjourning from Bandon to Macroom for Civil business only.

Ejectments, on notice to quit, for premises in the Division of Bandon, were made returnable to the Macroom Sessions, and served fifteen clear days before the 29th of October, the day on which the Macroom Sessions commenced.—*Held*, that the ejectments were right, and were duly served; and that it was not necessary that they should have been made returnable to and served in time for the Bandon Sessions.

• *Coram O'BRIEN, J. (Cork Spring Assizes 1859).*

1859.
Circuit Case.
MURPHY
 v.
CREEDAN.

and no more, should thenceforth be holden in each Riding," one in October, at Bandon, "adjourning from Bandon to Macroon, for Civil business only;" and one in January, at Bandon, all for the Division of Bandon (a). The ejectments had been made returnable to the Macroon Sessions, and had been served fifteen clear days before the 29th of October 1858, which was the day on which the Macroon Sessions commenced; but they had not been served in time for the Bandon Sessions, which commenced on the 25th of October. The Bandon and Macroon Sessions are both held in and for the Division of Bandon, in the West Riding of the county of Cork.—Decrees by the Chairman of the West Riding, and appeals therefrom.

C. Copinger and *M. J. Barry*, for the appellants.

The question for decision is, were these ejectments duly served for and made returnable to the Macroon Sessions? The appellants contend that the ejectments ought to have been served for and made returnable to the Bandon Sessions, commencing on the 25th of October, which was "the first day of the Quarter Sessions for the Division of the Riding in which the premises are situate." (b). The Macroon Sessions are not an independent Sessions, they are merely an adjournment of the Bandon Sessions; and by no possible construction, therefore, can the first day of the Macroon Sessions be held to be "the first day of the Quarter Sessions for the Division." The proclamation directs that four Sessions, "and no more," shall be held; and, if the Macroon Sessions should be held to be an independent Sessions, then there will be five Sessions in the West Riding in each year, contrary to the negative words of the proclamation. By the 14 & 15 Vic., c. 57, s. 109, the Chairman is empowered to *adjourn* civil-bills "to the next subsequent Session for the same Division;" and it cannot be contended that, under this section, the hearing of a civil-bill could be adjourned from the Bandon Sessions, which terminated on the 28th of October, to the Macroon Sessions, which commenced on the day following.

E. Sullivan, for the respondent in each of the appeals.

By the 14 & 15 Vic., c. 57, s. 31, the Lord Lieutenant in Council is empowered to appoint any one or more place or places in any Division for holding Sessions, and to alter them from time to time as he shall think fit; and by the next section (32), the Lord Lieutenant in Council is empowered to direct that a General Sessions shall be held any number of times, not exceeding four times yearly, *in all or any*

(a) Cop. C. C. 23. 25.

(b) 14 & 15 Vic., c. 57, s. 72.

of the places then or thereafter to be appointed. The proclamation is to be read in connection with these two sections, and then there is nothing inconsistent in construing the proclamation to mean that a General Sessions should be held in October at Macroom.

1859.
Circuit Case.
MURPHY
v.
CREEDAN.

O'BRIEN, J., having consulted with GREENE, B., decided that the ejectments were properly served for and made returnable to the Macroom Sessions; and that it was not necessary that they should have been served for and made returnable to the Bandon Sessions.
Decrees affirmed.

MOORE

v.

THE GREAT SOUTHERN & WESTERN RAILWAY CO.

(*Queen's Bench.*)

E. T. 1860.
Queen's Bench
April 30.

AN action had been brought by the plaintiff against the defendants, under the 8 & 9 *Vic.*, c. 20, s. 55, for injuries sustained by the plaintiff, in consequence of the lowering of a road adjacent to his premises, by the defendants, in the execution of their works. The defendants demurred to certain counts of the plaintiff's summons and plaint; and the Court of Queen's Bench, on the 24th of November 1858, allowed the demurrer with costs. The plaintiff having appealed, the defendants, on the 25th of April 1859, applied to the Court of Queen's Bench to stay all further proceedings in the cause, until security for the costs was given. The Court of Queen's Bench having declined to make any rule upon the motion, the defendants then made a similar application to the Court of Exchequer Chamber, which, on the 28th of May 1859, was refused with costs, to be paid by the defendants. Subsequently, the defendants arrested the plaintiff under a *ca. sa.*, for the costs of the demurrer. The defendants now applied to this Court, to restrain the plaintiff from issuing ex-

The plaintiff brought an action against the defendants, for injuries done to his land, in the execution of their works. The defendants demurred to certain counts of the summons and plaint, which demurrer was allowed by the Court of Queen's Bench, with costs. The plaintiff having appealed, the defendant applied to the Court of Exchequer

Chamber to stay all further proceedings by the plaintiff, until security for the costs was given. The motion was refused, and the defendants ordered to pay the costs of it. The defendants took the plaintiff in execution under a *ca. sa.*, for the costs of the demurrer.—*Held*, that the defendants were entitled to set off the costs of the demurrer, against the costs obtained by the plaintiff in the Exchequer Chamber, notwithstanding his having been taken in execution; the 35 *G. 3*, c. 35, s. 31 (*Ir.*), preventing such taking in execution of the plaintiff from operating as a satisfaction of the costs.

E. T. 1860. execution on the costs obtained by him in the Exchequer Chamber,
Queen's Bench. and offered to set off, as against such costs, the costs obtained by
 them upon the demurrer.

MOORE

v.

GT. S. & W.
 RAILWAY.

Serjeant *Fitzgibbon*, for the motion.

The costs obtained upon the argument of the demurrer, and which have been taxed, are properly the subject of set-off against the costs obtained by the plaintiff in the Exchequer Chamber. The taking of the plaintiff in execution does not operate as a satisfaction of the costs, as it would in England, the 35 G. 3, c. 35, s. 31 (*Ir.*), preventing it from having such an operation in this country.

Heron, contra.

The taking the plaintiff in execution deprives the defendants of their right to set off the costs of the demurrer against the costs of the plaintiff in the Exchequer Chamber. The right of set-off is precisely analogous to that of lien; and if a party having a lien upon goods takes them in execution under a *fi. fa.*, his right of lien is gone. This case is ruled by *Bead v. M'Carthy* (a).

LEFROY, C. J.

It appears to us, that the statute 35 G. 3, c. 35, s. 31, varies the effect, in Ireland, of taking a party in execution, from what it would have in England. In England it would operate as a satisfaction; in Ireland the Act allows execution to issue; and although the party is arrested and remains in gaol, that does not operate as a satisfaction of the debt. The Act of Parliament, in Ireland, takes away, as we may call it, a privilege which the party before had enjoyed, of being exempted, in consequence of of his arrest and detention, from the payment of the costs due by him. The principle of set-off, therefore, applies to this case, the Act leaving the party still liable to pay the costs.

O'BRIEN and HAYES, JJ., concurred.

(a) 9 Dowl. P. Cas. 136.

E. T. 1860.
Queen's Bench

In re O'BRIEN.

May 3.

W. J. SIDNEY applied, on behalf of the grantor, for leave to take the bill of sale which had been made upon the 9th of August 1859, and filed the 31st of August 1859, off the files of the Court, and to have it re-registered, upon the ground that the affidavit of the registration of such bill of sale did not contain the description and occupation of the grantor, and of each of the attesting witnesses thereto, as required by the 17 & 18 Vic., c. 55, s. 1. The bill of sale, though imperfectly registered under that statute, is good as between the grantor and the grantee. It is void as against the grantee only, if the goods be in the apparent possession of the grantor at the time of the execution: *Fonblanque v. Lee (a)*; *Hatton v. English (b)*.—[HAYES, J. By the Act of Parliament the officer is required to number every bill of sale which comes into the office, so as to show a regular sequence. If you now come in and take this bill of sale off the file, you may thereby give occasion to irregularities, which hereafter may be called in question. It is much better for you, to have another bill of sale registered, and another affidavit of registration sworn, with an engrossment thereon by reference to the first bill of sale, to the effect that each of the bills of sale is made for the same purpose, and relate to the same transaction; but that, by reason of an irregularity in the affidavit of registration of the first bill of sale, it became necessary to file this bill of sale and affidavit of registration. Now as the object of the Act is to furnish parties with notice of the transaction, the course I have suggested will have the good effect of making all parties acquainted with the real nature of the transaction, should any conflict arise hereafter between the grantee of this bill of sale, and other creditors of the grantor. Why then should we, who are the depositories of this machinery, preclude, or rather prejudice, all the questions which may hereafter arise, by obliterating our own records? and why should we undo what has been already done, when all that is now required may be attained by adopting the course which I have suggested?—The bill of sale passes the property *quoad* the grantor and the grantee: but, if another bill of sale be filed, with an affidavit of registration relating to the same subject-matter, then, upon any question arising, the creditors

The affidavit of registration of a bill of sale under the 17 and 18 Vic., c. 55, s. 1, omitted to state the description and occupation of the grantor, and of each of the attesting witnesses. An application to have the bill of sale and the affidavit of registration taken off the file, for the purpose of having this omission rectified, refused; the proper course being to file a new bill of sale and affidavit of registration, with an indorsement thereon, referring to the first bill of sale, and to the effect that each of the bills of sale is made for the same purpose and relate to the same transaction, but that by reason of an irregularity in the affidavit of registration of the first bill of sale it had become necessary to file the second bill of sale and affidavit of registration.

(a) 7 Ir. Com. Law Rep. 550.

(b) 17 El. & Bl. 94; S. C., 3 Jur., N. S., 294, 934 n; 26 Law Jour., Q. B., 161.

* *Coram LEFROY, C. J., O'BRIEN and HAYES, JJ.*

E. T. 1860.
Queen's Bench
In re
O'BRIEN.

would contend that nothing passed under this second bill of sale. There is only one way of getting rid of a bill of sale, which is, by entering satisfaction upon it under section 6 of the Act; but that cannot be done so long as the debt remains in existence. Again, the affidavit of registration must be filed along with the bill of sale; but, unless the entire thing be commenced *de novo*, that cannot be done in the present case. An application like the present was acceded to in *Re Wright* (a), by Wightman, J., in England.

LEFROY, C. J.

It appears to me that no answer has been given to the observations made by my Brother HAYES, and that to grant this application would lead to a total disturbance of the records required to be kept by the officer of the Court. But, further, the learned Counsel making this application has not pointed out any mischief or injury which is likely to arise from his adoption of the course of proceeding which has been suggested. It is not possible for us, upon a motion like the present, to anticipate, nor can we, nor ought we to, enter into a full investigation of all the possible objections and difficulties which may result from our allowing this record to be taken off the file. For these reasons, and especially for the reason that we should be very slow in obliterating the records of the Court, this application must be refused; the course of proceeding suggested answering all the purposes of this application, and being one from which no mischief or injury can result.

O'BRIEN, J.

I do not see any reason why parties, other than the grantor and the grantee, should be kept in ignorance of the real nature of the transaction, by our permitting the erasure of the records of the Court. I cannot see any objection to adopting the course which has been suggested; and, even were that case in England an authority upon the point, I do not consider that we are bound by it in the present instance, the application in that case having been made upon a state of facts altogether different from those relied on in this case. I think, therefore, that this application should be refused.

HAYES, J.

I have already stated the grounds upon which, in my opinion, this application ought not to be granted.

(a) 27 Law Times, 192.

FITZGIBBON v. NAGLE.*

E. T. 1860.
Queen's Bench.
April 30.

MOTION to set aside a defence as embarrassing, and as not traversing any material fact, &c.—Count; in the ordinary form, against an agent, to whom goods were consigned for sale on commission, for not accounting, and re-delivering the residue of the goods unsold.—Defence; that the defendant did not undertake and promise in manner and form as in the said count alleged.

Jellett, for the motion.

The promise relied on in the count is founded on a past consideration, and is an inference of law, arising from the fact of the consignment and receipt of the goods to be sold on commission: *Topham v. Braddick* (a). If the defence is intended to traverse both the promise and the consideration, it is bad, as amounting to the general issue: *Dowling v. Wallace* (b); and if it admits the consideration, but denies the promise, it is bad, as traversing a conclusion of law.

W. J. Sidney, for the defence.

Dowling v. Wallace was an *ex parte* case; and the defence there did not traverse any material averment in the plaint, such as the accepting of the bill which was sued on: *Com. Law Proc. Act* 1853, s. 70. This defence goes to the gist of the action, by traversing the contract, which is a material fact; but it admits the receipt of the goods.—[*LEFROY*, C. J. If that is the meaning of the defence, why is it not so pleaded in terms?—It is not necessary, in addition to traversing the contract alleged in the plaint, to go on and state specifically what in fact was the contract between the parties; because the plaintiff cannot succeed in his action unless he proves the contract on which he sues.

LEFROY, C. J.

The object of the Common Law Procedure Acts was to avoid the mischief of the old general issue, and to enable parties to go to trial acquainted with what it is they are to try, instead of leaving the plaintiff in ignorance of the defence which he will have to encounter at the trial. This defence is plainly embarrassing; the defendant must either deny the facts alleged in the plaint, or confess and avoid them. It is not competent for him to traverse an inference of law.

Defence set aside with costs, and leave given to amend.

(a) 1 Taunt. 572.

(b) 3 Ir. Com. Law Rep. 83.

* O'BRIEN, J., *absente*.

To a count against an agent, to whom goods were consigned for sale on commission, for not accounting for the goods sold, and re-delivering the unsold residue of the goods, the defendant pleaded "that he did not undertake and promise, in manner and form as alleged."—*Held*, that the defence was embarrassing, as amounting to the general issue.

E. T. 1860.
Queen's Bench

RONAYNE v. PERRIN.

May 1.

In order to obtain a rule to appoint a person as next friend for a lunatic or a minor, satisfactory information as to the fitness of such person must be furnished to the Clerk of the Rules, by the attorney applying for the rule; in the case of lunatics by the affidavit of such attorney, and in the case of minors by affidavit, or otherwise.

THIS was a motion to remove a person who had been appointed, under the Common Law Procedure Act 1853, s. 51, as next friend for the defendant, who was alleged to be a lunatic.

The Court, having inquired into the practice in the office, directed that in future the Clerk of the Rules shall not enter a rule to appoint a next friend for a minor or lunatic plaintiff or defendant, unless in addition to the provisions of the Common Law Procedure 1853, ss. 50, 51, the Clerk of the Rules shall be satisfied, in the case of lunatics, by the affidavit of the attorney applying for such rule, and, in the case of minors, by sufficient information, either by affidavit or otherwise, that the person so nominated as next friend is a fit and proper person in that behalf.

WILLIAMS v. WILLIAMS.*

April 30.

A defence to an action of trespass *quare clausum fregit*, that the house in the plaint mentioned is not the *property* of the plaintiff, as alleged, is embarrassing, and will be set aside.

MOTION to set aside a defence as embarrassing.—Trespass, for breaking and entering the plaintiff's houses.—Defence, "that the houses in the plaint mentioned were not, nor were any of them, the property of the plaintiff, as in the plaint alleged."

Coates, for the motion.

This is a possessory action. The plaintiff neither pleads *liberum tenementum*, nor confesses and avoids. The true question is not whether the houses in the plaint mentioned were the *property* of the plaintiff; for mere possession is sufficient as against a trespasser.

Purcell, for the defence.

This plea puts in issue nothing more than the fact of possession by the plaintiff. It is equivalent to a plea that the houses were not the houses of the plaintiff, which is a perfectly good plea. Property is not a term of art; *id est cujusque proprium quo quisque frui et utitur* (*Cicero Epist. ad Fam.*, 7, 30.)—[LEFROY, C. J. The moment you raise successfully a question of ambiguity, you make

* O'BRIEN, J., *absente*.

out the plaintiff's case. There is no ground shown for sending a question to the jury as to the property. The right of property—the right of possession, and mere naked possession, are three distinct things in law; and how is the plaintiff to know what is the question you are going to try? You do not say in terms that the houses are not the houses of the plaintiff.—HAYES, J. In *Jones v. Chapman* (a) it was held, in trespass for breaking and entering the plaintiff's close, that, under a plea that the close was not the close of the plaintiff, the defendant might show the right to the possession either in himself or some person by whose authority he acted. Your plea passes by the question of possession, and raises a question of property.]—Circumstances may exist where mere possession would not enable the plaintiff to maintain this action: *Burling v. Read* (b). —[LEFROY, C. J. This form of pleading is every way objectionable. It would be sufficient to sustain the action if the plaintiff was actually in possession, or had a legal right to the possession; and that is a totally different thing from having a right of property.]

E. T. 1860.
Queen's Bench
WILLIAMS
v.
WILLIAMS.

Per Curiam.

Set aside the defence with costs; leave to amend.

- (a) 2 Exch. 803; S. C., 18 Law Jour., Ex., 456.
(b) 11 Q. B. 904; S. C., 4 Jur. 395; 19 Law Jour., Q. B., 291.

BOYD v. M'CLEANS.*

May 3.

MOTION on behalf of the defendants, that a memorandum of satisfaction be entered on a warrant of attorney, filed in this Court in Hilary Term 1859, and given by the defendants to confess judgment on a bond for the penal sum of £600.

The affidavit on which the application was grounded was made by one of the defendants; and it stated the making of the bond in question, the execution of the warrant of attorney, and the filing of same, pursuant to 3 & 4 Vic., c. 105, the payment of the amount due on foot of the bond by the defendants on a day named, and the acknowledgment by the plaintiff, on back of the bond, of having received the sum of money for which it was given as a security. The bond itself was produced in Court, and the signature of the

Memorandum of satisfaction ordered to be entered on a warrant of attorney, under the 3 & 4 Vic., c. 105, s. 18; the defendant having sworn to the payment of the sum due upon the bond, and the bond, with an acknowledgment on the back of it signed by the plaintiff (which was

verified), admitting the receipt of the sum for which it was given, having been produced in Court.

* *Coram* HAYES, J.

E. T. 1860. plaintiff appeared thereon, acknowledging the payment, which signature was attested to by a solicitor.

Queen's Bench
BOYD
v.
M'CLEANS.

Faloon, for the motion.

This application is made under the 18th section of 3 & 4 Vic, c. 105, which enacts "That it shall be lawful for any of the Judges of the Court in which the said warrant of attorney, or copy thereof, is filed, to order a memorandum of satisfaction to be written upon such warrant of attorney, or copy thereof respectively, as aforesaid, if it shall appear to him or them that the debt for which such warrant of attorney is given as a security shall have been satisfied or discharged." The bond is in fact cancelled; and the signature of the plaintiff, attested by an officer of the Court, acknowledging payment of the debt, and the affidavit of the defendant swearing to payment, is evidence sufficient to satisfy the Court that the debt is satisfied: *Dover v. Dunphy (a)*.

HAYES, J.

I think so; take the order.

(a) 6 Ir. Law Rep. 128.

HALL v. BLACKWELL.*

May 5.

Execution cannot be issued on a judgment entered on a warrant of attorney collateral with a money bond conditioned for payment by instalments, until breaches have been duly suggested on the bond.

MOTION on behalf of M. Murphy, official assignee, and J. Hickie, trade assignee of the defendant, a bankrupt, that the writ of *fi. fa.*, executed on a warrant of attorney collateral with a money bond conditioned for payment by instalments, until breaches have been duly suggested on the bond.

A, by a letter of the 4th of March, proposed to sell his business and stock to B, for a sum to be paid by yearly payments of £60 per annum, in monthly instalments of £5 each; the whole amount to be secured, with interest, by B's bond, and by an assurance on B's life, to be effected by B, who was to pay the premiums thereon. This proposal was accepted by B, by a letter of the same month, and B was accordingly put into possession of the business and stock, and executed a money bond to A, conditioned for the payment of £300 and interest; B also executed a warrant of attorney, on which judgment was entered, collateral with the bond, but no policy of assurance was effected, as agreed. B paid one instalment in the following June, which was duly acknowledged by A, by a letter of the 4th of June; but default having been made in payment of subsequent instalments, A issued execution on the judgment, without suggesting breaches.—*Held*, that there was an agreement that the purchase-money should be paid by instalments, the bond being referred to in the letters, and consequently that breaches ought to have been suggested before execution was issued on the judgment. The execution, therefore, was set aside.

* FITZGERALD, J., *absente*.

issued in this case, directed to the Sheriff of the County of Clare, E. T. 1860. and under which the defendant's goods were sold, on, &c., be set aside, on the grounds that the execution was issued on foot of a judgment obtained on a bond and warrant of attorney, which bond was subject to certain defeasances, and conditions of such a nature, that the plaintiff, before issuing execution thereon, should have suggested breaches thereon, pursuant to the statute, &c.

Queen's Bench.
HALL
v.
BLACKWELL

It appeared by the affidavits of the trade assignee, and of the plaintiff, that the defendant had been in the employment of the plaintiff, who carried on a hardware business. That the plaintiff proposed to sell his stock and business to the defendant, and wrote the following letter :—

“Kilrush, March 9, 1859.

“Mr. G. BLACKWELL.

“DEAR SIR—The terms on which I will dispose of my shop and stock in Kilrush to you are—you to take the stock as stock-book taken by yourself (a) last month, and £30 for fixtures, &c.; the debts are not to be taken by you, but I will call them in gradually, so as not to interfere with the house. You are to pay me £60 per annum, by remitting £5 per month, until all is paid; if you remit more, so much the better. The outstanding debt to bear interest at £5 per cent. per annum, until fully cleared up. Security, a bond for the whole amount, and an insurance on your life, say for £250, so as not have a heavy premium; you to pay the premium.

“Yours, “A. HALL.”

That this proposal was accepted by the defendant, by a letter, dated the 11th of March inst., and containing the following passage:—“I am well aware of the nature of a bond, as it steps in by way of first judgment in cases of bankruptcy.” That, on the 17th of March inst., the defendant executed his bond, in the penalty of £600, conditioned for the payment of the principal sum of £300, and also a warrant of attorney for confessing judgment thereon, whereon judgment was entered; but no policy of assurance was effected by the defendant, pursuant to the agreement; and that the defendant was then put into possession of the stock and business. That the first instalment of £8. 14s. 1d. was paid, and acknowledged by the plaintiff by a letter, on the 4th of June 1859; and subsequently several money dealings took place between the plaintiff and defendant. The defendant did not effect the insurance on his life, as agreed upon, although requested by the plaintiff to do so. That, without assigning or suggesting breaches, the plaintiff issued execution on the judgment, under which the Sheriff of the County of Clare seized defendant's goods. That on the day before the day fixed for the execution sale, the defendant signed a

(a) *Sic.*

E. T. 1860.
Queen's Bench.
HALL
v.
BLACKWELL

declaration of insolvency, which was afterwards filed in the Bankrupt and Insolvent Court, and that P. Hickie (a creditor of the defendant's) shortly afterwards presented a petition of bankruptcy against the defendant, who was subsequently declared a bankrupt, and Hickie appointed trade assignee. That the execution sale took place, and the proceeds of the sale were paid over by the Sheriff to the plaintiff, upon an indemnity.

R. Armstrong (with him *W. J. Sidney*), for the motion.

It is necessary that breaches should have been suggested on the bond, before execution was issued on the judgment. It was agreed that the purchase-money should be paid by instalments, although the whole amount was to be secured by bond; and after the bond has been executed, the letter of the 4th of June acknowledged the payment of one instalment, and thus connects the agreement and the bond together: *Stratton v. Codd* (a); *Delacour v. Murphy* (b); *Montgomery v. Byrne* (c).

Kernan and *T. Lynch*, for the plaintiff, the execution creditor.

This bond is merely a common money bond, and therefore it is unnecessary to suggest breaches upon it: *Gorman v. Hinks* (d). Secondly; none of the cases cited on the other side were cases of common money bonds; they are no authority, therefore, in the present case. Next, as to the letters of the 9th and 11th of March.—[*LEFROY*, C. J. There must be some link in writing to connect those letters with the bond.—*HAYES*, J. The question here is, is there sufficient to connect the bond with the letters?—In all the reported cases the agreement has been referred to in the condition of the bond, or in some collateral writing admittedly connected with the bond.—[*O'BRIEN*, J. *Harrington v. Coxe* (e) establishes that if the condition of the bond is to pay by instalments, execution cannot issue without a suggestion of breaches on the bond.]—Lastly; the insurance referred to in the plaintiff's letter was not effected, and consequently the agreement was not carried out on the defendant's part.

Sidney, in reply.

The bond, warrant and judgment are all void by the last Bankrupt Act, 20 & 21 *Vic.*, c. 60, s. 333. He also referred to the Common Law Procedure Act 1853, ss. 145, 146 and 147, and to *Power v. Low* (f).

(a) 9 Ir. Law Rep. 1.

(c) 2 Ir. Com. Law Rep. 230.

(e) 3 Ir. Com. Law Rep. 87.

(b) 13 Ir. Law Rep. 195.

(d) Batty, 527.

(f) 5 Ir. Com. Law Rep. 364.

LEFROY, C. J.

The question in this case is not what is the law, but what is the agreement of the parties? That agreement is contained in the letters of the 9th and 11th of March, in which the plaintiff agreed to sell, and the defendant to buy, the stock in trade and business, upon certain express terms: the defendant was to pay £60, by monthly instalments, and to give security, by his bond, for the whole amount of the purchase-money. The agreement, on the plaintiff's part, is then carried out by the plaintiff putting the defendant into possession; and, after the bond is executed, the letter of the 4th of June passes between the parties, acknowledging the receipt of one instalment, and expressly recognising the agreement. The 145th section of the Common Law Procedure Act 1853 provides for the assignment of breaches in any action on any bond, covenant or *agreement* for payment of any penal sum for non-performance of any covenant or *agreement* contained in any deed or *writing*; and here is a security, by bond, for the performance of an agreement in writing, contained in the letters, which makes the amount payable in instalments, from time to time; the plaintiff was entitled to make use of his security to enforce the payment of the instalments, from time to time, in which he had agreed to accept payment of the purchase-money, but not further; and I am, therefore, of opinion that the plaintiff ought to have suggested breaches, and that he was not at liberty to issue execution for the whole sum.

E. T. 1860.

*Queen's Bench.*HALL
v.
BLACKWELL

O'BRIEN, J.

I had some doubt as to the agreement contained in these letters; but I think it is an agreement in writing that the purchase-money shall be paid by instalments, and after the bond is passed to secure the whole amount, the letter of the 4th of June recognises the agreement; it appears to me, therefore, to amount to a bond conditioned for the payment of money by instalments; and in that case breaches must be suggested.

HAYES, J., concurred.

Motion granted.

T. T. 1860.
Queen's Bench.

May 25.

Trover, and conversion of defendant's goods by plaintiff, cannot be pleaded as a defence by way of set-off to an action for a liquidated sum.

CUFFE v. LAWSON.

COVENANT.—The plaint sought to recover the sum of £76. 17s. 10d. sterling, and contained five counts. First count, for breach of covenant in not paying to the plaintiff £60. 4s. sterling; second count, for breach of covenant in not paying the said sum within a reasonable time; third count, for £16. 13s. 4d. sterling, money paid; fourth count, for the same sum of money lent; fifth count, on an account stated.

Defence.—Payment into Court of £10. 0s. 10d. sterling. And as to the sum of £66. 17s., the residue of the said sum of £76. 17s. 10d., the defendant says that the plaintiff was, before and at the time of the commencement of this suit, and still is, indebted to defendant in an amount equal to the said sum of £66. 17s., for goods bargained and sold by the defendant to the plaintiff.

And for goods sold and delivered by the defendant to the plaintiff.

And for goods of the defendant, which the plaintiff converted to his own use.

The plaintiff replied to the first two paragraphs of the defence of set-off, and demurred to the third paragraph of the same defence, which was for goods of the defendant converted by the plaintiff to his own use.*

W. J. Sidney (with him *J. W. Carleton*), for the demurrer.

The provisions of the old statutes of set-off are consolidated in the Common Law Procedure Act 1853, s. 40. Set-off cannot be

* **NOTE.**—The following points were noted for argument:—

First.—That the money sought to be set off by the third paragraph of the defence is not a debt or liquidated demand.

Second.—That it is sought to set off unliquidated damages arising from a tort.

Third.—That it is sought to set off unliquidated damages, the amount of which was unascertained, and incapable of being ascertained at the time of pleading, and which could not be ascertained, save by the intervention of a jury.

Fourth.—That the said third paragraph confesses the plaintiff's cause of action, but does not show any matter of legal avoidance.

Fifth.—That it is sought set to off, as a cross demand, damages for the wrongful conversion of goods, the amount of which cross demand could only be ascertained by the verdict of a jury.

Sixth.—That the said third paragraph does not show that the plaintiff was indebted to the defendant, before or at the commencement of the suit, or at the time of filing the defence, or at any time; but merely shows a cross demand sounding in damages.

pleaded except in cases where there are mutual debts, or cross demands, liquidated and ascertained, or capable of being ascertained, at the time when the defence was pleaded. In the present case the defendant's demand for the conversion of his horses by the plaintiff is unliquidated and unascertained: *Crawford v. Stirling* (a); *Morley v. Inglis* (b). The residue of the defence being unobjectionable in point of law, the demurrer is rightly limited only to the objectionable part of it: *Chit. Pl.*, by *Greening*, 7th ed., p. 601.

T. T. 1860.
Queen's Bench.
 CUFFE
 v.
 LAWSON.

M. Morris and *J. E. Walsh*, for the defence.

The demurrer is irregular, having been taken not to a distinct plea, but to a portion of a plea; but the several parts of the defence, none of which purport alone to answer the action, combine to make up the plea of set-off.—[HAYES, J. Is that so? See *Ring v. Roxborough* (c).]—In any case this is not a case for general demurrer; if the plaintiff was embarrassed by the defence he should have moved to set it aside; but the defence is good in law; the paragraph which has been objected to is in trover, and it is well settled that in trover the plaintiff may waive the trespass, and sue for the value of the article: *Lamine v. Dorrell* (d); *Young v. Marshall* (e). The value of the horses in this case is estimated, by the plaintiff, at £50; the demand is then a liquidated one, and liquidated demands are proper subjects of set-off: *Morley v. Inglis* (f); *Scott v. Anderson* (g).

Carleton, in reply.

The value of the horses, which were alleged to be converted, was not capable of being ascertained at the time when the defence was pleaded; and, according to the rule laid down by Tindal, C. J., in *Morley v. Inglis* (h), is not the subject of set-off, which distinguishes it from goods sold and delivered, which are presumed to have been sold at the market price of the day: *Castelli v. Boddington* (i).—[HAYES, J. Wherever goods have been sold and delivered, there is a debt which may be set off, and the amount must be ascertained by the jury.]—In this case the value of the horses is not the measure of damages; for if the plaintiff had merely taken the defendant's horses out of the field, and ridden them and put them back again,

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|---|-----------------------------|
| (a) 4 Esp. 207. | (b) 4 Bing., N. C., 58. |
| (c) 2 Cr. & Jer. 418; 8. C., 2 Tyr. 468. See 2 Cr., M. & R., 331. | (e) 1 Moo. & Sc. 110, 113. |
| (d) 2 Lord Ray. 1216. | (g) 2 Ir. Jur., N. S., 422. |
| (f) <i>Supra</i> . | (i) 17 Jur. 457, 460. |
| (h) <i>Supra</i> , p. 71. | |

T. T. 1860. *Queen's Bench.* he would be liable to the defendant in trover, and yet the value of the horses would not be the measure of damages: *Countess of Rutland's case*; 1 *Rol.*, tit., *Action sur Case* (L), 1; *Greening v. Wilkinson* (a).
 CUFFE
 v.
 LAWSON.

Per Curiam.—Allow the demurrer.

(a) 1 Car. & P. 625.

June 4.

KENNEDY v. LYNCH.

An application to change the venue, after plea pleaded, and before issue joined, is not premature.

T. Harris (with him *M. Morris*) applied to change the venue in this case.

Purcell, contra, objected that the application was premature, plea only having been pleaded, but issue not joined: *The Guardians of the Youghal Union v. Atkinson* (a). Until issue is joined, how can it be known what is the question really to be tried? and until that is ascertained, the Court is not in a position to decide whether it would be proper to change the venue or not. Until the issues are served, it is competent to the plaintiff, by replication, if necessary, to vary the whole of the facts relied on in the defence; and the consequence of granting the motion at this stage of the pleadings may be that the plaintiff may be deprived of the right conferred on him by the Common Law Procedure Act 1853, of laying his venue where he pleases, upon a state of facts which afterwards turn out to have no existence.

LEFROY, C. J.

When plea is pleaded, that suggests what the issues are likely to be, and the parties can then form a very good idea of the question which is to be tried between them. Should there be a new assignment, the Court, upon application, would, no doubt, make such order as justice should require.

O'BRIEN, HAYES and FITZGERALD, JJ., concurred.

(a) 9 Ir. Com. Law Rep., App., xvii.

E. T. 1860.
Common Pleas.

KERR

v.

THE MIDLAND GREAT WESTERN RAILWAY CO.

(*Common Pleas*).

April 30.

THIS was an application, on behalf of the plaintiff, that the costs already taxed in this action should be referred back to the Master for re-taxation, and that the plaintiff should be allowed his full costs of suit, instead of half costs, which had only been allowed to him on taxation, and that the defendants should pay the full costs of the special jury, which they had obtained. This action was brought against the defendants as common carriers; and the summons and plaint consisted of two counts, the first averring the Common Law duty of the defendants, and the second setting forth a special contract. The only issue upon which the jury found was upon the first count, they having being discharged from finding upon the second. The first count averred that the defendants were common carriers of sheep, for hire, from Enfield, in the county of Meath, to Dublin; that the plaintiff delivered to them, as such common carriers, and that they, as such common carriers, received from the plaintiff, divers, to wit twenty, sheep of the plaintiff, to be carried by them from Enfield to Dublin, within a reasonable time, and within such reasonable time to be delivered by them at Dublin, for hire and reward, in that behalf; yet that the defendants did not carry the said sheep to Dublin within a reasonable time: by reason of which grievance the plaintiff was unable to have said sheep at a certain market held in Dublin upon a certain day, &c.

The plaintiff obtained a verdict for £14; and the Taxing-master refused to allow more than half costs, conceiving that the case came within the provisions of the 243rd section of the Common Law Procedure Act 1853.*

An action against a common carrier, founded upon his Common Law duty, is not an action "for a wrong or injury disconnected with contract," within the provisions of the 243rd section of the Common Law Procedure Act 1853; and therefore the plaintiff is not entitled to full costs, in case he recovers less than £20; but the defendant, in such case, having obtained a special jury, and no certificate having been given by the Judge, is liable for the full costs of the special jury.

* NOTE.—The 243rd section provides "That, in case the plaintiff, in any action of contract (except for breach of promise of marriage), shall recover, inclusive of costs, less than £20, or in any action for any wrong or injury disconnected with contract (except replevin, or for slander, libel, malicious prosecution, seduction or criminal conversation), a sum not exceeding £5, the plaintiff in any such action shall be entitled to no more than one-half the ordinary costs, unless the action has been brought for the purpose of trying a right to property more extensive than the sum sued for."

E. T. 1560.
Common Pleas.

KERR

2.

M. CT. W.
RAILWAY.

Palles, in support of the application.

The first count, being altogether founded upon breach of the Common Law duty of the defendants, as common carriers, is in tort, and, therefore, does not come within the provisions of the 243rd section, as to actions of contract: *Legge v. Tucker* (a); *Burnett v. Lynch*, per Littledale, J. (b); *Chitty on Pleading*, p. 416 (1831). The defendants having applied for and obtained a special jury, and the Judge having given no certificate that it was a fit and proper case for a special jury, the costs of the special jury are to be borne by the defendants, the verdict having been under £20: *Coghlan v. Carney* (c).

Battersby and Levinge, contra.

This is not an action "disconnected with contract," that expression applying solely to that class of cases of action for which actions of contract could not be brought; but, in the present case, the plaintiff might have sued in contract, without averring the Common Law duty of the defendants: *Latham v. Rutley* (d); *Chitty & Temple on Carriers*, p. 180; *Forward v. Pittard* (e); *Keys v. The Belfast and Ballymena Railway Company* (f).

Palles was heard in reply.

Cw. ad. vult.

MONAHAN, C. J.

May 1.

This case turns on the construction of the 243rd section of the Common Law Procedure Act of 1853.—[His Lordship read the section.]—And we are of opinion that, in order to arrive at the true construction of either of the clauses of this section, referring to contract, we must have regard to the entire section; and, accordingly, we conceive that the Legislature intended to include in this section all cases in which a contract subsisted between the parties. It is, therefore, necessary, as forms of action have been abolished in this country, that we should consider what is the substantial *cause of action* between the plaintiff and defendants here; and although if forms of action still subsisted, this first count might be regarded as a count in case, still we cannot hold that it sets forth a cause of action "disconnected with contract;" for a contract is stated, although an express promise is not absolutely alleged. We have, therefore, no doubt that this case comes within the provisions of the 243rd section; and the consequence is, that the plaintiff will be

(a) 1 Exch., N. S., 500.

(c) 1 Ir. Law Rep. 201.

(e) 1 T. R. 33.

(b) 5 B. & C. 609.

(d) 2 B. & C. 20.

(f) 8 Ir. Com. Law Rep. 167.

only entitled to half costs. As regards the costs of the special jury, as the defendants obtained it, and as no certificate was given by the Judge at the trial that it was a fit case to be tried by a special jury, we are of opinion that the defendants must pay the full costs thereby occasioned, and not half costs. There will be no costs of the motion.

Rule accordingly.

E. T. 1860.
Common Pleas.

KERR
v.
M. GT. W.
RAILWAY.

POWELL

v.

ATLANTIC STEAM NAVIGATION COMPANY.

(*Exchequer*).

E. T. 1860.
Exchequer.
April 17, 19.

In this case, *M. Morris*, on the part of the plaintiff, had obtained, on the 3rd of February 1860, a conditional order to substitute service of the writ of summons and plaint, as the defendant resided out of the jurisdiction of the Court.

The action was brought to recover the sum of £62. 6s. 10d., the value of a trunk, the property of the plaintiff, alleged to have been lost by the defendants. The summons and plaint contained five counts; and the third count, on which the plaintiff in this motion mainly relied, averred that the "Defendants were the proprietors of a certain vessel called the 'Circassian,' sailing from New York, in the United States of America, to Galway in Ireland, and divers other places, for the carriage and conveyance of passengers and their luggage, for reward in that behalf; and whereas, whilst the said defendants were such owners of said vessel, to wit, in the month of August 1859, at New York aforesaid, they, the said defendants, received on board said vessel the said plaintiff, as a passenger therein, to be conveyed from New York aforesaid, to Galway aforesaid, together with a certain box or trunk of the said plaintiff, containing divers goods and chattels of the plaintiff, to wit, &c., of the value of £62. 6s. 10d., to be carried and conveyed in said vessel from New York aforesaid, to Galway aforesaid,

In an action against an English Company, for the loss of luggage, the summons and plaint averred that the defendants received on board their vessel the plaintiff, as a passenger from New York to Galway, with a trunk, &c., to be carried in said vessel from New York to Galway, and safely to be delivered for the plaintiff.

Breach—that the defendants, disregarding their duty, &c., did not safely or securely

carry same to Galway, but, on the contrary, so carelessly and negligently behaved themselves that, through the carelessness and negligence of the defendants, the box and its contents were wholly lost.—*Held*, that the plaintiff stated a cause of action within the jurisdiction, which would justify an order for substitution of service.

E. T. 1860. "and safely and securely to be delivered for the said plaintiff, at
Eschequer. "and for certain reasonable reward to the said defendants in that
 POWELL "behalf; yet the said defendants, not regarding their duty in that
 v. "behalf, did not, nor would, safely or securely carry or convey said
 ATLANTIC "box and its contents from New York aforesaid to Galway afore-
 STEAM CO. "said; nor, at Galway aforesaid, safely or securely deliver the same
 "for the said plaintiff: but, on the contrary thereof, they, the said
 "defendants, so carelessly and negligently behaved and conducted
 "themselves in the premises that, by and through the carelessness
 "and negligence of the said defendants, the said box and its
 "contents, as aforesaid, became and was wholly lost to the plain-
 "tiff."

The fifth count was in trover, for the conversion of the plaintiff's trunk.

The conditional order for substitution of service was obtained upon the affidavit of the plaintiff, in which he stated that the defendants had an office at No. 4 College-green, in the city of Dublin, and at Galway; that John Macnamara Cantwell was solicitor for the defendants, and acting for them in a cause then pending, and "that the cause of action in this cause arose "within the jurisdiction of this honourable Court, and not else-
 "where."

On behalf of the defendants an affidavit was filed, as cause against the conditional order, by a person of the name of Butler, the passage broker of the defendants at Galway, who swore that it was his duty, on the arrival of any of the Company's ships at the port of Galway, to see that the cargo and luggage of passengers were cleared out and landed and delivered; that he had gone on board the "Circassian," on her arrival, and before any of the passengers or their luggage, or any portion of the cargo, were or was landed or cleared out of the vessel; that the Custom-house officers had also examined the luggage of every passenger before it was taken out of the ship; that the plaintiff had pointed out his luggage among that on the deck, with the exception of one box which he said he had brought on board with him at New York; that on that and the following day a thorough and diligent search was made for the plaintiff's box, but that no such box was found, or was then on board; that the defendants had not converted to their own use the plaintiff's luggage, and that it did not, after the arrival of the ship at Galway, get into the possession of the defendants, or any of their officers or servants, and that the plaintiff's box had probably been taken by a passenger of the same name, who had landed at St. John's. Affidavits were also made to show that the

defendants were an English Company, and their registered office was in London. E. T. 1860.

Exchequer.

POWELL

v.

ATLANTIC
STEAM CO.

M. Morris, in support of the motion, cited *Kisbey v. Chester and Holyhead Railway Company (a)*.

S. Ferguson and *R. Dowse*, contra.

In *Kisbey v. Chester & Holyhead Railway Company*, there was a count for the detention of the plaintiff's luggage in Ireland. The count in *trover* in this case could not be sustained, for there would be no evidence to support it: *Smith v. Young (b)*; *Verrall v. Robinson (c)*.

It is impossible to distinguish this case from *Watson v. Atlantic Steam Navigation Company (d)*, decided in this Court last Term, by GREENE, B. That case, as this, was for the loss of the plaintiff's luggage, and there was a contract alleged to deliver in Galway; but, as here, the action was founded on negligence, and every affirmative fact constituting the cause of action occurred outside the jurisdiction. They cited *Frew v. Stone (e)*; *Kett v. Robinson (f)*; *Betham v. Fernie (g)*.

M. Morris, in reply.

The third count here is clearly in *assumpsit*. The breach is the non-delivery in Galway. The contract being to deliver in Galway, the breach could not take place until it was ascertained whether or not the defendants would deliver. The trunk might have been recovered between Newfoundland and Galway. In *Watson v. Atlantic Steam Navigation Company*, the vessel was lost at sea, and the whole action arose out of that, and was then complete.—[GREENE, B. In *Watson's case* everything occurred out of the jurisdiction. The action might have been brought immediately after the loss of the ship, and it never could arrive in Galway.]

Cur. ad vult.

No judgment was given, but the Court, on this day, made the following order.

April 19.

It is ordered by the Court that the conditional order of the 3rd of February 1860 be, and the same is hereby, made

(a) 2 Ir. Jur., N. S., 330.

(b) 1 Camp. 439.

(c) 2 Cr., M. & R. 495.

(d) 10 Ir. Com. Law Rep. 163.

(e) 6 Ir. Jur. 267.

(f) 4 Ir. Com. Law Rep. 186.

(g) 4 Ir. Com. Law Rep. 92.

Appendix.

E. T. 1860.

Eschequer.

POWELL

v.

ATLANTIC
STEAM CO.

absolute; and, accordingly, that service of the writ of summons and plaint in this cause, at the offices of the defendants, in Dublin and Galway, upon some person or persons representing the defendants therein, and upon John M. Cantwell, be deemed good service of the said writ upon defendants.

INDEX.

ABATEMENT.

See PROMISSORY NOTE.

ABOLITION OF FORMS OF ACTION.

See USE AND OCCUPATION.

ACCOMPLICE.

See CORRUPT PRACTICES PREVENTION ACT 1854.

ACQUIESCENCE.

See GRAND JURY ACT.

ACTION FOR RENT.

To an action for £40 arrears of rent, the defendant pleaded, by way of equitable defence, as to £14. 2s. 0½d., part, &c., that R. had purchased the arrears from the plaintiff's testator, and that the plaintiff therefore was suing as R.'s trustee. That after R. had purchased the arrears, and before this action, R. was indebted to P. in a sum of £14. 2s. 0½d., being the balance of a sum of £20, which R. had, by agreement bearing date the 24th of March 1855, promised to pay to P., on receiving "full legal possession of certain premises from P. and his wife;" and that although R. did receive such "full legal possession," yet that he only paid £5. 17s. 11½d., leaving a balance of £14. 2s. 0½d. due. That P. assigned the latter debt to the defendant; and that P. and the defendant mutually agreed that R. should retain the debt so due by him to P., in satisfaction of so much of the arrears of rent; of which R. had notice. It appeared from certain letters, which comprised the above agree-

ment of the 24th of March 1855, and which the Court permitted to be used on the argument, upon the authority of *Armstrong v. Turquand* (9 Ir. Com. Law Rep. 32), that the agreement was for payment of £20, to P. and his wife, upon R. receiving from them full legal possession of certain premises, of which they were jointly seised as tenants for life.—*Held*, insufficient, as an equitable defence. *C. P. Colles v. Prendergast*
336

ADVERSE POSSESSION.

A, the owner of a fee-simple estate, let C into possession of a portion of the lands, as tenant at will. Subsequently, in 1806, the lands were settled by A upon himself for life, with remainder to B in fee. A died in 1811. C continued in possession, without payment of rent or acknowledgment of title, until 1847, when he assigned his interest to his son D, the defendant, and died in 1857. In 1830, a mortgage in fee was executed by the devisee of B, which, by mesne assignments, became vested in one of the plaintiffs, who, in 1859, brought an ejectment on the title against D.—*Held*, that, assuming the possession of C not to have been adverse at the date of the execution of the mortgage in 1830, the mortgagee, who had received interest within twenty years next before the bringing of the ejectment, was entitled, by the 7 W. 4 and 1 Vic., c. 28, to recover possession, though more than twenty years had elapsed since the title of the mortgagee had accrued.

Quære—Whether the possession of C

AFFIDAVIT.

became, in 1811, upon the death of the tenant for life, adverse to the remainderman?

An affidavit, sworn by a party for the purpose of parliamentary registration, under the 10 G. 4, c. 8, in which it was stated that he held under a lease, and an entry, made in the registry-book by the Clerk of the Peace, stating, amongst other particulars, the life in the lease to be that of the tenant, were produced as secondary evidence of such a lease.—*Held*, that inasmuch as such entry was, by the statute, directed to be made by the Clerk of the Peace, from the contents of the affidavit, which was silent about the terms of the lease, his act was, to that extent, extra-ministerial, and the entry could not be made evidence thereof. *C. P. Eyre v. Walsh* 346

AFFIDAVIT.

See ADVERSE POSSESSION.

AMENDMENT.

See AWARD.

ANNUITY.

See SEPARATION DEED.

APPEAL.

See JUSTICE OF THE PEACE.

APPEARANCE, TIME FOR.

See PROCEDURE ACT.

APPORTIONMENT.

See REGISTRY APPEAL, 4.

ARBITRATION.

See AWARD.

RAILWAYS CONSOLIDATION
ACTS, 1, 2.

ARREST.

See ASSAULT.

BARRISTER.

ASSAULT.

To an action for assault and false im-

ATTACHMENT ORDER.

prisonment on a false charge, the defendant pleaded, by way of justification, that an application, by the plaintiff in the present action, for compensation for a malicious burning, had been refused at a Presentment Sessions held at the Court-house of P., of which Presentment Sessions the defendant, before whom informations (pursuant to the 6 & 7 W. 4, c. 116, s. 137) had been sworn by the plaintiff at Petty Sessions, was Chairman; that the plaintiff, after the refusal of the application, was allowed to make copies from the informations, having been first cautioned not to take away the informations; but that, during the temporary absence of the Chairman, in discharge of his duty, the plaintiff was about to leave the Court-house, with the informations in his pocket, when the Chairman, who had then returned to Court, in order to prevent the plaintiff from abstracting the informations, directed a constable, in whose view the whole proceeding had occurred, to take the informations from the plaintiff; that the constable did accordingly detain the plaintiff, and take the informations from him, and that, in so doing, no unnecessary violence was used, which was the assault and false imprisonment complained of.—*Held*, overruling a demurrer to the defence, that the above justification was a good answer to the action. *Q. B. Gowing v. Walsh* 431

ASSESSMENT OF DAMAGES.

See RAILWAYS CLAUSES ACTS, 1, 2.

ASSIGNMENT OF BREACHES.

See BOND.

ATTACHMENT.

See WEIGHMASTER.

ATTACHMENT ORDER.

See BOND.

PRACTICE, 3.

AWARD.

AWARD.

The Court will not remit for amendment an award which is not void upon the face of it; and, therefore, where in an action referred to arbitration, the reference having provided, "that the costs of said reference, and of the said action, whether any such should be paid, and, if any, whether same should be full or partial costs should be in the discretion of J. M." (one of the arbitrators); and the award as to the costs was as follows:—"I, the said J. M., do also award, adjudge and determine, of and concerning the matters so referred to me solely: I award, order and direct that the said defendant do and shall pay to the plaintiffs their costs of the said action, and of the aforesaid reference."—*Held* (upon appeal from an order made by a Judge in Chamber, remitting the award to the arbitrator for amendment), that the award, not being void upon the face of it, should not be remitted to the arbitrator for amendment.

Held also, that the plaintiff was entitled, under the award, to his full costs, although the sum awarded as damages was only £1. C. P. *Cleary v. Cleary*
329

BAKERS ACT.

See CONVICTION.

BARRISTER.

A practising barrister, who had been attending in the Hall of the Four-courts, and had there received a brief in a case set down for hearing upon that day, but which, prior to his receiving the brief, had been postponed till the next day, was arrested, while returning homewards, on the same day.—*Held* (*dubitantibus* BALL and CHRISTIAN, JJ.), that he was entitled to be discharged from arrest, on the ground of privilege. C. P. *Rubenstein v. —*
386

BOND.

The defendant executed a bond, with

BOUNDARIES.

565

warrant of attorney to confess judgment, in the penal sum of £620, the only condition of the bond being for the payment of £310, and interest.—Contemporaneously with the execution of the bond, the plaintiff wrote a letter to the defendant, by which he undertook that, upon the defendant effecting a policy of assurance on his life, in favour of the plaintiff, for the sum of £310, and paying interest thereon, upon the days therein specified, that he would not put the bond, or a judgment thereon, in force.—*Held*, that in order to entitle the plaintiff to issue execution, it was not necessary, either formerly under the 9 W. 3, c. 10 (*Ir.*), or now, under section 145 of the Common Law Procedure Act 1853, which is substituted for that statute, to assign breaches; the object of the bond, in reserving the payment of the penal sum, not being to secure the performance of some duty or agreement, but to secure the payment of a sum certain, which was a *bona fide* subsisting debt.

The Suitors' Fee-fund is "money," within the meaning of section 135 of the Common Law Procedure Act 1853 (*per* LEFROY, C. J. and O'BRIEN, J.), and as such is chargeable by an attachment order made under that section (HAYES, J., *dubitante*).—The word "money," which occurs in the first and third clauses, but is omitted from the second clause of section 135, must be imported, by implication, into such second clause, in order to effectuate the clear intention of the Legislature to deal with "money" in that section, and, by so importing it, to prevent section 135 being rendered completely nugatory as to "money."

When the intention of the Legislature can be collected from the statute itself, words may be modified, altered or supplied in the statute, so as to obviate any repugnancy to, or inconsistency with, such intention. Q. B. *Quin v. O'Keeffe*
393

BOUNDARIES.

See DEED, 2.

BREACHES.**BREACHES.***See* **BOND.****BRIBERY.***See* **CORRUPT PRACTICES PREVENTION ACT.****BRIDGE.***See* **GRAND JURY ACT.****CERTIORARI.***See* **GRAND JURY ACT.****CESTUI QUE VIE.***See* **LEASE, 2.****CIRCUMSTANCES OF PARTIES,
PROOF OF IN ACTION FOR
MONEY LENT.***See* **EVIDENCE.****CLAIMANT, LIABILITY OF TO
BE EXAMINED.***See* **REGISTRY APPEAL, 6.****COMMONAGE AND TURBARY.***See* **LEASE, 1.****CONSIDERATION.***See* **MARRIAGE SETTLEMENT.
SEPARATION DEED.****CONSTRUCTION.***See* **BOND.****DEED, 2.****DOCUMENT.****CONTRACT.**

The plaintiff and defendant agreed that the plaintiff should take defendant's mare in exchange for that of plaintiff; that the defendant should give plaintiff the half of the winnings of her two first races, or, in case she should be sold before then, the defendant should pay the plaintiff one-third of what she should be sold for.—*Held*, that the above agreement, being one simply to give an increased price for the mare, upon the occurrence of

CONVICTION.

a state of facts which might add to her value, was a legal contract, and not in the nature of a wager.

The defendant's mare having won a prize of £50 at a horse-race, the conditions of which were that a subscription should be made up, of the sum of three sovereigns each, subscribed by the owners of the horses, and a sum of thirty sovereigns added thereto, out of the race fund, out of which the expenses, and a sum of £1. 10s., were to be deducted and paid to the treasurer, and £3. 3s. to the owner of the second horse:—*Held*, that the races referred to in the agreement were to be such as were legal, within the 8 & 9 Vic., c. 109, s. 18, and that the race in question satisfied the requirements of the statute. C. P. *Crofton v. Colgan* 133

CONSTRUCTION OF STATUTE.*See* **BOND.****CONVICTION.****CONVICTION.**

The 1 & 2 Vic., c. 28 (Bakers Act), does not, either expressly or by necessary implication, repeal any part of the Market Juries Acts (27 G. 3, c. 46, *Ir.*, and 28 G. 3, c. 42, *Ir.*), the jurisdiction created by the former Act being superadded to, and not substituted for, the authority conferred on market juries by the latter Acts; and, therefore, market juries are justified, under the Market Juries Act, in seizing meal mixed with other meal of an inferior quality, and so fraudulently and illegally exposed or made up for sale; and in taking such mixture and the offender before the Chief Magistrate, who is empowered to deal with the case pursuant to the 1 & 2 Vic., c. 28.

Per LEFROY, C. J.—The mere recital in a subsequent statute, of an intention to repeal a former specific statute, will not operate, by implication, to repeal the former statute. In order to accomplish such a repeal, there

CORRUPT PRACTICES ACT.

must be a clause to that effect in the latter statute.

Per LEFROY, C. J.—More general words in a subsequent affirmative statute, not referring expressly to a former specific statute, are not sufficient to effect a repeal of the former statute, if both statutes can stand together. Q. B. *Mahony v. Wright*

420

CORRUPT PRACTICES PREVENTION ACT.

See PENALTIES.

PRACTICE, 4.

In an action for a penalty, brought under the Corrupt Practices Prevention Act 1854, s. 2, for offering a bribe to a voter, the only evidence against the defendant was the uncorroborated testimony of the plaintiff, who was the party sought to be bribed. The plaintiff admitted having entered into such a negotiation with the defendant as would have subjected himself to an action for a penalty, under section 3 of the same Act. It having been objected that the defendant could not be convicted upon the above evidence, in the absence of corroboration, inasmuch as the plaintiff was to be regarded in the light of an accomplice:—*Held*, that, assuming an analogy to exist between criminal cases and penal actions, there was no inflexible rule of law which rendered illegal a conviction obtained upon the uncorroborated testimony of an accomplice.

Held also, that no such analogy existed between criminal cases and actions for penalties, and that the case was rightly submitted to the jury, upon the sole evidence of the plaintiff. C. P. *McClory v. Wright*

514

COSTS.

See AWARD.

PENALTIES.

PRACTICE, 5.

COVENANT.

See LEASE, 2.

DEED.

567

DEED.

1. Where the witnesses to the original deed were "T. F.," "S. M.," "E. H." (no additions being annexed to any of these names), and in the memorial appeared the words, "which said deed and this memorial are witnessed by —," followed by a blank, and the grantor's name and seal; and subsequently, these words "signed, sealed and executed in the presence of T. F., S. M." (without any additions), followed by an affidavit by S. M., verifying the signature of the deed by the grantor and several of the grantees, and stating that deponent had seen the memorial executed by the grantor, and that he (deponent) was one of the subscribing witnesses to the deed and the memorial:—*Held*, that the registry was invalid, on the ground of the memorial not containing the names of said T. F. and S. M.

The tenant for life under the foregoing settlement granted a lease for a certain term, provided that his title should so long subsist.—*Held*, that the lease, when registered, displaced the unregistered settlement, and that the lessee became entitled to hold for the term, unaffected by the fact of the lessor having been, at the date of its execution, only tenant for life. C. P. *Harding v. Carry*

140

2. A deed of conveyance from the Incumbered Estates Court granted "All that part of B., together with the *kelp-shore*, containing 443 acres, and described in the annexed map; together with the sea-weed cast on the *said kelp-shore*, subject to the tenancies in the schedule annexed."

The map annexed to this deed drew the boundary line along the high-water mark upon the shore; and the description of the *kelp-shore* in the schedule tallied in measurement with the deed, supposing the boundary line to be the high-water mark.—*Held*, that parol evidence was not admissible to show that the words

DEFENCE.

"kelp-shore" would include the portion between high and low-water mark, the terms of the deed describing the subject-matter of the grant with sufficient certainty.

Held also, that the shore between high and low-water mark did not pass by the deed. That the "kelp-shore" was, by reference to the map and schedule, rendered a certain and specific description, and that the maxim of *falsa designatio* did not apply. E. *Boyle v. Mulholland*

150

DEFENCE.

See EQUITABLE DEFENCE.
PROMISSORY NOTE.
TRESPASS, Q. C. F.

DELIVERY AS AN ESCROW.

See DOCUMENT.

DEMAND OF RENT.

See EJECTMENT, 1.

DEMISE.

See TRESPASS.

DEMURRER.

See LORD CAMPBELL'S ACT.
PROMISSORY NOTE.
RAILWAYS CONSOLIDATION
ACTS, 1.
USE AND OCCUPATION.

DEVISE.

See MARRIAGE SETTLEMENT.

DISCRETION OF MAGISTRATES.

See MANDAMUS.

DESCRIPTION.

See DEED, 1.
LEASE, 1.

DISQUALIFICATION.

See QUO WARRANTO, 1.

EJECTMENT.

DOCUMENT.

N., a candidate for the office of sexton in a parish church, solicited the appointment from B., who had the sole right of nomination. B. wrote and delivered to him the following document:—"Dublin, 12th of July 1858. —This is to certify that I approve of J. N. being appointed to the situation of sexton to the parish of St. A., vacant by the resignation of T. O'C. —To all whom it may concern—W. B., Vicar."—*Held*, that this document amounted to an actual present appointment of N.

Held also, that the parol evidence of B. was inadmissible to explain the document, and show that it referred to a future appointment.

Semle.—The circumstances (if any there were) attending the delivery of the document to N. by B. might be submitted to the jury as evidence from which they might infer that the document was an escrow, or conditional appointment. E. *Newenham v. Smith*

245

EASEMENT.

See TRESPASS.

EJECTMENT.

1. Certain premises were held under a written agreement, which, after declaring that the rent was to be paid monthly in advance, contained the following clause:—"In case I fail in the punctual payment of said monthly payments, and that any of them shall be in arrear for six weeks after the period at which same ought to be paid, pursuant to this agreement, the said A. C., his heirs and assigns, shall be at liberty to re-enter, and take possession of the building, without resorting to any legal process for that purpose."—*Held*, that this provision merely gave to the lessor a right of re-entry, to enforce which a formal demand of rent was necessary.

Thomas v. Packer distinguished.
C. P. *Barry v. Glover*

113

EJECTMENT.

2. In ejectment on title, a new trial will not be granted on the ground of newly-discovered evidence, when, by the exercise of due diligence, such evidence might have been obtained and produced at the former trial.
Q. B. *Cahill v. Hartnett* 439
3. In ejectment on title, a new trial will not be granted on the ground of newly-discovered evidence, when the party applying for the new trial was, before the former trial, aware of the existence of the evidence, and might, on a proper application for that purpose, have obtained a reasonable postponement of the former trial until he had obtained such evidence.

Rules by which the Court is governed as to granting a new trial on the ground of newly-discovered evidence. The Court is slow to relax such rules in cases of ejectment on title. Q. B. *O'Grady v. Dwyer* 440

EJECTMENT FOR NON-PAYMENT OF RENT.

By indenture in 1761, D. O'Callaghan, sen., demised lands to Nash, for two lives, and such other lives as should for ever thereafter be added, pursuant to the covenant for perpetual renewal therein. In 1769, Nash demised the same lands to Withers, for 993 years; and in 1782, Withers demised the lands to Atkins, for 950 years, at a profit-rent. Both the lives in the lease of 1761 being dead, that lease was renewed in 1794 to Nash's representatives, by C. O'Callaghan (heir-at-law of D. O'Callaghan, sen.), for the lives of two persons, the survivor of whom died in 1837. In 1807, C. O'Callaghan became assignee of Nash's interest. From 1823 to 1849, the assignees of Atkins' interest paid to D. O'Callaghan, jun. (heir-at-law of C. O'Callaghan), as assignee of Nash's interest, the rent reserved by the lease of 1769, and also, during the same period, paid to the representatives of Withers the profit-rent

EJECTMENT, &c. 569

reserved by the lease of 1782; but no rent was paid after 1849. In 1851, D. O'Callaghan, jun., brought ejectment for non-payment of the rent reserved by the lease of 1769, and recovered possession of the lands; but the representatives of Withers were not served with O'Callaghan's ejectment. In 1858, Withers' representatives having brought ejectment for non-payment of the rent reserved by the lease of 1782:—*Held*, affirming the judgment of the Queen's Bench, that this ejectment was not maintainable, the tenancy, if any, being nothing more than a parol yearly tenancy, created by overholding, and payment of rent from 1837.—[Pigot, C. B., *dissentiente*.]

The Irish statutable ejectment for non-payment of rent cannot be maintained upon a tenancy created by a parol demise from year to year, express or implied.—[Pigot, C. B., *dissentiente*.]

Notwithstanding the covenant for perpetual renewal, by D. O'Callaghan, sen., in the lease of 1761, and even assuming that Nash and his representatives were bound to keep up that lease by due renewals, in order to keep on foot the term of 993 years demised by Nash to Withers in 1769, the result, at Law, of the assignment of Nash's interest to the heir-at-law of D. O'Callaghan, sen., in 1807, was to merge the lease of 1761, and the renewal thereof, in the reversion, and, therefore, upon the fall of the lives in that lease and renewal, to destroy the term of 993 years, which depended thereon for its continuance, the doctrine of enlargement not being applicable to such a state of facts, so as to keep the term subsisting.—[Pigot, C. B., *dissentiente*.]

A tenancy which arises from overholding, and payment of rent after the expiration of a lease, is a *parol* tenancy from year to year, arising by implication of law, though regulated by such of the provisions of the ex-

pired lease as are applicable to a tenancy from year to year.

The rule of Law, that, although the tenant is estopped from disputing the title of the landlord under whom he has taken possession, yet he is at liberty to show that the landlord's title has determined, applies to a statutable ejectment for non-payment of rent, as well as any other species of action.

Per MONAHAN, C. J.—The 5 G. 2, c. 4, s. 4 (*Ir.*), applies only to surrenders of existing leases, and not to cases where leases have determined at Law.

The object and effect of the Irish Ejectment Statutes considered.

Thomas v. Packer (1 H. & N. 669; S. C., 3. Jur., N. S., 143; 26 Law Jour., Exch., 207) considered in reference to the Irish Ejectment Statutes. Q. B. & Ex. Ch. *Foot v. Warren* 1

EMBARRASSING PLEA.

See MAGISTRATES.
PLEADING, 1.

ENLARGEMENT.

See EJECTMENT FOR NON-PAYMENT OF RENT.

ESTOPPEL.

See EJECTMENT FOR NON-PAYMENT OF RENT.

EQUITABLE DEFENCE.

See ACTION FOR RENT.

EXECUTION.

See PRACTICE, 5.

EXCEPTIONS.

See PRACTICE, 5.

EVIDENCE.

See ADVERSE POSSESSION.
DOCUMENT.
ORAL SLANDER.
REGISTRY APPEAL, 2, 3, 6.

GRAND JURY ACT.

In an action for money lent, evidence of the poverty of the alleged lender is admissible upon the issue whether or not the money was lent. *E. Dowling v. Dowling* 236

EVIDENCE OF VALUE.

See REGISTRY APPEAL, 2.

FALSA DESIGNATIO.

See DEED, 2.

FALSE IMPRISONMENT.

See ASSAULT.

FORMS IN PROCEDURE ACT.

See USE AND OCCUPATION.

FRAUDULENT REPRESENTATION.

See PROMISSORY NOTE.

GAME LAWS.

A party having a sufficient property qualification to kill game, where the lease, of which he holds the reversion, reserved "free liberty to the lessor, his heirs and assigns, his and their servants and followers, to hunt, hawk, fish and fowl upon the demised premises," is entitled to employ a servant, not possessing the property qualification required by the 10 W. 3, c. 8, s. 8, to kill and hunt game in his absence.

Held also, that where a special verdict is defective, in not finding a material fact, but simply leaving it a matter of inference, it is competent for the Court to award a *venire de novo*. Ex. Ch. *Foot v. Hudson* 509

GENERAL WORDS.

See DEED, 2.

GRAND JURY ACT,

A presentment for a bridge had been passed by the grand jury, and rated; voluntary contributions were raised

in aid of the presentment, and part of the sum presented had been levied; the contractor also had expended considerable sums in labour and materials, in preparing for the construction of a bridge.—*Held*, that the Court would not, upon the application of parties who had actively concurred in passing the presentment, and had since acquiesced in it, grant a *certiorari*, to bring up the presentment, for the purpose of quashing it, upon the grounds that the grand jury had no authority to grant it, and that it was void upon the face of it, for omitting to state the section of the statute, and the year of the King's reign in which one of the statutes relied on had been passed.

Held also, that it made no difference that the parties who had so concurred and acquiesced were trustees for an infant, whose rights might possibly be prejudiced by the construction of the bridge. Q. B. *In re Franks* 93

HORSE-RACING.

See CONTRACT.

INFANT.

See GRAND JURY ACT.

INJURY TO LAND.

See RAILWAY CONSOLIDATION ACTS, 1, 2.

INSUFFICIENT DEFENCE.

See TRESPASS, Q. C. F.

INTERROGATORIES.

See WEIGHMASTER.

IRISH EJECTMENT CODE.

See EJECTMENT FOR NON-PAYMENT OF RENT.

IRRELEVANCY OF STATEMENT.

See LIBEL, 1.

JOINT OCCUPATION.

See REGISTRY APPEAL, 7.

JUSTICE, ACTION AGAINST.

In an action against a Justice of the Peace, for acts done in the execution of his office, the proof of notice of action is a necessary part of the plaintiff's case, and must be given by him, though the want of it may not be relied upon in pleading by the defendant. E. *Lawrenson v. Hill* 498

JUSTICE OF THE PEACE.

Where a ticket, under the 3 and 4 Vic., c. 91 (Linen Act), contained a special clause that the whole of the cloth must be returned within five weeks from date, or 1s. 6d. to be deducted for every week longer kept:—*Held*, that though such an agreement was not in terms contemplated by the 16th section of the Act, it was not opposed to its policy; and that where the employer had been summoned before the Petty Sessions for the wages stipulated in the ticket, he was entitled to set off the penalty for delay. C. P. *Dobbin v. Aikin* 130

JUSTIFICATION.

See ASSAULT.

RAILWAYS CONSOLIDATION ACTS.

LANDED ESTATES COURT.

See PRACTICE, 3.

LANDLORD AND TENANT.

See EJECTMENT FOR NON-PAYMENT OF RENT.
TRESPASS.

LEASE.

1. A lease was granted in 1852, to J. M., of "all that, &c., that part of the lands of M., containing, &c., together with a right of commoragge and turbarry for the use of the said farm, as now in the possession of the said J. M., situate, &c., as by a map of said lands, in the margin hereof, will appear; being part of the lands conveyed to the grantor by a deed, dated 31st of October 1851," &c. It appeared, by necessary intendment, that,

B L

at the time of the execution of said lease of 1852, J. M. was in possession, not only of the forty-one acres, but also of a right of commonage, on the adjoining mountain, for the use of said farm.—*Held*, that the lease gave to J. M. the farm in question, together with the same commonage and turbary which he then enjoyed in respect thereof.

J. M., in 1858, demised to J. F. and others seventeen acres, portion of the forty-one acres, by the following description:—"All that, &c., part of the lands of Moyglass, containing seventeen acres, now in the possession of the said J. F. and partners, together with a right of commonage and turbary, for the use of the said farm," for a term of eighteen years, which was a shorter term than that for which the grantor was possessed.—*Held*, that the lessees of the seventeen acres acquired by the sub-lease, as against the head landlord, a proportional share of the common appurtenant to the forty-one acres. C. P. *O'Hare v. Fahy* 318

2. A lease *pur autre vie* contained a either that, "if the *cestui que vies*, or clause of them, should be absent from Ireland for three whole years at one time, such life, in respect to the continuance of this demise, shall be considered as if actually dead from the end of such three years." It then provided that, at any trial at Law, or hearing in Equity, at the suit of the landlord, concerning the premises, "it shall be incumbent on the defendant to prove the *cestui que vies* or the survivor in being, and that they or he, then or within three years next preceding the commencement of such action or suit, was actually in Ireland, or, in default of such proof, this lease shall be determined to be, and shall be, *ipso facto*, void," &c. In 1847, one of the *cestui que vies* died, the other one had left Ireland in 1845; and, after he had been absent for more than three years, an ejectment on the title was brought, and the pre-

mises were evicted, judgment having gone by default. After a lapse of several years, the plaintiffs, who were defendants in the former ejectment, brought a cross ejectment, and proved at the trial that the surviving *cestui que vie* was alive at the time of the former action; that he had since returned to Ireland, and had only recently gone back to America.—*Held*, that, inasmuch as under the clause in the lease it was incumbent on the tenant to have proved, in the former suit, that the *cestui que vie* was then in Ireland, by the omission to do so the lease had conclusively determined, and could not be set up by giving such proof in the present action. C. P. *Scullin v. M'Naghten* 526

LEGACY DUTY, LIABILITY TO.

It is not necessary, in order that legacy duty should be payable in respect of the personal estate of any person, that such person should have acquired in his lifetime a present right to receive the fund charged.

Upon the marriage of W., a sum of £15,950 was settled upon certain trusts for W., and A. his wife (in bar of her share in his personal estate), and upon the issue of the marriage; and it was provided that if there should be no issue, or, being such, they should all die before they became entitled to a vested interest in the fund, then, after the decease of W. and A., the fund was to be held "for the only proper use and behoof of W., his executors, administrators and assigns." W. died, leaving issue B, C and D, who were his next-of-kin. B, C and D then died, without having attained a vested interest in the fund, and the trust in favour of W.'s estate became absolute, subject to A.'s rights. At B's death, his next-of-kin were C, D and A. The next-of-kin of C were D and A., and D's sole next-of-kin was A. The defendant, who was the personal representative and residuary legatee of A., also took out represen-

LESSEES, &c.

tation to W., B, C and D.—*Held*, that he had received or retained the fund (within the meaning of the 37th section of the 5 & 6 Vic., c. 82), for the benefit of the personal representatives of W., A., B, C and D, i. e., of himself, and that he was liable for legacy duty in respect of each of those five estates. E. *Attorney-General v. Maxwell* 262

LESSEES AND OCCUPIERS.

See REGISTRY APPEAL, 5, 7, 8.

LIBEL.

1. No action lies against a party for a statement in an affidavit, made by him as a witness, in the course of a cause, although such statement was irrelevant, and was expunged from the affidavit as prolix, impertinent and scandalous, by an order of the competent Court. E. *Kennedy v. Hilliard* 195
2. To an action for oral slander the defendant pleaded that before, &c., plaintiff and defendant were brother officers, and defendant was interested in the good character of plaintiff, and that no officer of the regiment should be guilty or suspected of any crime, "and that it was the duty of the defendant to mention to the adjutant of the regiment the existence of any such imputation upon the character or conduct of the plaintiff, as such brother officer, in order that the said imputation might be inquired into," and, if found to be false, removed. That before, &c., the plaintiff had been placed under arrest, upon a charge prejudicial to his character, and that directions were given, according to the Articles of War, and entered in the regimental order book, for holding a court-martial to investigate said charge; that all said facts were matters of notoriety in the regiment; that, at the time of the speaking, &c., the day for the court-martial had not arrived, and plaintiff was under arrest; "and that, under the circumstances aforesaid, the defend-

LORD CAMPBELL'S ACT. 573

ant entered into conversation with Ensign Dunne," the adjutant, at the said barracks, concerning all said matters; that, before said conversation, it had been reported to defendant, which defendant believed to be true, that plaintiff had committed the offence imputed by the alleged slander; and "defendant, in the course of the said conversation, mentioned to the said Ensign Dunne, the adjutant, the said matter so reported;" and, in so doing, spoke and published the words, &c., in good faith, and without malice, and believing same to be true.—*Held* (Pigot, C. B., *dubitante*), that the facts stated in the plea did not show the communication to be privileged. E. *Bell v. Parke* 279

LIMITATION.

See DEED, 1.

LIMITATIONS, STATUTE OF.

See ADVERSE POSSESSION.

LINEN ACT.

See JUSTICE OF THE PEACE.

LODGER.

See REGISTRY APPEAL, 8.

LORD CAMPBELL'S ACT.

To an action by the plaintiff, as husband and administrator of his deceased wife, to recover compensation under Lord Campbell's Act (9 & 10 Vic., c. 93), the defendant pleaded, *inter alia*, that the plaintiff did not, with the summons and plaint, deliver to the defendant, or to his attorney, a full particular of the persons for whom and on whose behalf the action was brought, and of the nature of the claim in respect of which damages were sought to be recovered in the action, as required by the statute, intituled, &c.—*Held*, upon demurrer, that the plea was no answer to the action, the requirements of section 4 of the 9 & 10 Vic., c. 93, that the particulars therein specified shall be

delivered, together with the declaration, to the defendant, or his attorney, being merely in accordance with the rules and practice of the Court in which the action may be depending; the right of action accruing prior to the issuing of the declaration, and existing altogether independent of the fact of the declaration being issued or not. In such case, the defendant, if he require particulars, should call upon the plaintiff to furnish them; or, in case of his refusal, apply to the Court to compel him to do so. Q. B. *Murphy v. Logan*

87

MAGISTRATES.

A warrant issued by a Justice, founded upon an information which discloses no criminal offence, cannot be sustained by proof that there was in fact parol evidence on oath given, which conveyed a criminal charge. Trespass is maintainable under the 2nd section of the 12 *Vic.*, c. 16, if, in the particular act of issuing the warrant, the Magistrate acted without or in excess of jurisdiction, although he had a general jurisdiction over the subject-matter of inquiry. In such a case, the Magistrate is not protected by the 2nd section, although he *bona fide* believed that he was acting within his jurisdiction.

A pleading susceptible of one interpretation on demurrer, and another at *Nisi Prius*, is embarrassing; and the Court, upon a question whether it was sustained by evidence, will construe it as it would have done upon general demurrer. E. *Lawrenson v. Hill*

177

MANDAMUS.

Where Magistrates presiding at Petty Sessions refuse to sign the certificate of good character required by the 17 & 18 *Vic.*, c. 89, s. 11, in order to entitle a publican to obtain a renewal of his spirit license, the Court of Queen's Bench cannot issue a mandamus to

MARRIAGE SETTLEMENT.

compel them to do so; notwithstanding that the Petty Sessions order has been reversed on appeal to the Quarter Sessions, pursuant to the 18 & 19 *Vic.*, c. 62, s. 2.

Where a discretion is by statute vested in Magistrates, the Court will not interfere by mandamus to control its exercise. Q. B. *The Queen v. Justices of the Peace Co. Dublin* 80

MAP.

See DEED, 2,

LEASE, 1.

MARKING JUDGMENT.

See PROCEDURE ACT.

MARKET JURIES ACTS.

See CONVICTION.

MARRIAGE SETTLEMENT.

In a marriage settlement, the ultimate remainderman to the settlor in fee-simple does not come within the consideration of the marriage, or any other consideration moving from the wife, and amounts simply to a declaration of the continuance of his old estate in the settlor.

A B, being seised in fee, by deed of settlement upon his first marriage in 1766, conveyed his estate to the use of himself for life, remainder to the issue of the marriage, in tail male, remainder to C D, his brother, for life, remainder to the issue of C D, in tail male. In 1780, upon his second marriage, A B conveyed the same estates to the use of himself for life, remainder to such sons of the marriage as he should appoint, and, in default thereof, to the issue of the marriage, in tail male, "and, in default of such issue, to the use and behoof of the said (A B) and his right heirs for ever." A B had no issue of the first marriage, and one daughter, M N, of the second, to whom he devised the settled property.—*Held*, that the conveyance in the first settlement to C D, although

MASTER AND SERVANT.

voluntary, prevailed against the devise to M N. C. P. *Massy v. Travers* 459

MASTER AND SERVANT.

See GAME LAWS.

MAYOR.

See QUO WARRANTO, 2.

MEDICAL ACT.

The proof of registration required by the 32nd section of the Medical Act (21 & 22 Vic., c. 90), by which medical men are precluded from recovering for professional services, without proof of registry, is sufficient if it be shown that the plaintiff is registered at the time he tenders such proof in evidence. E. *Haffield v. Mackenzie* 289

MERGER.

See EJECTMENT FOR NON-PAYMENT OF RENT.

MONEY.

See BOND.

MOTION FOR PRODUCTION OF DOCUMENTS.

See PROCEDURE ACT.

MUNICIPAL CORPORATION ACT.

See QUO WARRANTO, 1, 2.

NEGLIGENCE.

See PLEADING, 2.

NEW TRIAL.

See EJECTMENT, 2, 3.

GAME LAWS.

RAILWAYS CLAUSES ACT.

NEWLY-DISCOVERED EVIDENCE.

See EJECTMENT, 2, 3.

NOTICE OF ACTION.

See JUSTICE, ACTION AGAINST.

NOTICE OF CLAIM.

See REGISTRY APPEAL, 1, 2, 3, 4.

PARCELS.

575

OATH.

See WEIGHMASTER.

OCCUPATION.

See REGISTRY APPEAL, 5, 8.

OMISSION FROM PLAINT, OF "THE LANDS OF THE PLAINTIFF."

See USE AND OCCUPATION.

ORDER OF HOUSE OF LORDS.

See PRACTICE, 5.

ORAL SLANDER.

See LIBEL, 2.

In an action for oral slander, alleged to have been spoken of the plaintiff in his trade, the plaintiff's witnesses failed to prove the speaking of words sufficient to support the allegations of the summons and plaint; but a witness, called on the part of the defendant, admitted, on cross-examination, having, at the request of one of the plaintiff's witnesses, written an account of the words used by the defendant upon the occasion in question. The last-mentioned witness, upon re-examination, stated that the paper was the witness's own version of the transaction. The written statement having been admitted at the trial, subject to objection, as evidence to sustain the charge—*Held* that, although admissible for the purpose of impeaching the credit of the writer, the document in question was no evidence of the facts therein stated, and ought not to have been submitted to the jury as such.

It is necessary, in actions of slander, for the plaintiff to prove the actual words alleged, or enough of them to sustain the action; and it will not be sufficient to prove the speaking of other words of similar meaning, and involving the same offence. C. P. *M'Connell v. M'Ken-* 511

PARCELS.

See LEASE, 1.

576 PAROL EVIDENCE.

PAROL EVIDENCE.

See DEED, 2.

PAROL YEARLY TENANCY.

See EJECTMENT FOR NON-PAYMENT OF RENT.

PARTICULARS OF CLAIM.

See LORD CAMPBELL'S ACT.

PARTNERSHIP.

See TRESPASS.

PENALTIES.

See JUSTICE OF THE PEACE.

In a personal action, brought to recover penalties under the Corrupt Practices Prevention Act (17 & 18 Vic., c. 102), the Court will order the plaintiff to give security for costs, where it is sworn, and not contradicted, that the plaintiff is a pauper, that he has been put forward by third parties for an ulterior purpose, and that the defendant has a good and substantial defence on the merits. C.P. *M'Lester v. Quinn* 358

PERMANENT INJURY TO LAND.

See RAILWAYS CLAUSES ACT.

PLAINTIFF WITHIN THE JURISDICTION.

See PRACTICE, 1.

PLEA TO PART OF CAUSE OF ACTION.

See PLEADING, 1.

PLEADING.

See JUSTICE, ACTION AGAINST.

MAGISTRATES.

REFLEVIN.

TRESPASS, Q. C. F.

1. To an action for £116. 16s. 0d., rent under a lease, the defendant, taking "defence to the action," pleaded, "as to £58. 8s., parcel of the sum claimed in the first count of the summons and plaint," certain matter in bar, con-

PRACTICE.

cluding, "and therefore he defends the action."—*Held*, that this defence was embarrassing, as being in form pleaded to the entire cause of action, and not confessing, in terms, the portion left unanswered. E. *Lord Dunsandle v. Finney* 171

2. The first count of the plaint, which was in trespass, complained that the plaintiff being the owner of a certain Railway, and of the carriages, &c., thereon, which were necessarily and properly on the Railway, the defendant contriving, &c., caused a certain truck or waggon to be drawn with great force against the carriages, &c., and broke to pieces five of them. The second count was in case, for negligence. To the first count of the summons and plaint the defendant pleaded that the said truck or waggon was put in motion by the servants of the defendant, in the usual and ordinary course of his trade and business, and as he lawfully might, under and by virtue of the provisions of a certain indenture, dated, &c., made, &c., and otherwise upon a certain tramway that crossed the said Railway; and without any contrivance or intention to injure the plaintiff, on the part of the defendant or his servants, the truck or waggon struck against the carriages of the plaintiff, which were unnecessarily, and without proper care and notice to the defendant or his servants, and not necessarily and properly, as alleged, placed by the plaintiff or his servants on that part of the Railway at which the collision took place.—*Held*, upon demurrer, that this defence was no answer to the count in trespass, not being a traverse, or a plea in confession and avoidance of the injury complained of. Q.B. *M'Cormick v. Ballantine* 305

PRACTICE.

See LORD CAMPBELL'S ACT.

1. The Court will not order a plaintiff, an heir-at-law, to give security for costs, because it is sworn that he is a pauper, and had agreed, if he should

PRACTICE.

succeed, to give a large sum of money to a third person, it being denied that he had been put forward by that person to bring the action. *E. M'Caffrey v. Brennan* 159

2. Where a summons and plaint stated a contract by the plaintiff at New York, with the defendants, an English Company, to convey him and his luggage to, and deliver them at, an Irish port, and then averred, as a breach, that the defendants did not so deliver them, but that, through the negligence of the defendants and their servants, &c., the vessel was wrecked at sea, and the luggage lost:—*Held*, that no part of the cause of action had arisen within the jurisdiction, so as to justify the Court in substituting service of the writ of summons and plaint upon the agent in Ireland of the defendants. *E. Watson v. Atlantic Royal Mail Steam Navigation Company* 163

3. This Court has no power, since the passing of 21 & 22 Vic., c. 72, the Sale and Transfer of Land (Ireland) Act, to attach the interest of a debtor in funds standing to the credit of a matter in the Landed Estates Court. *E. Sawyer v. Norris* 168

4. In an action for penalties, under the Corrupt Practices Act, 17 & 18 Vic., c. 102, an application for security for the costs to be thereafter incurred was refused, the application not having been made until after there had been an abortive trial, and notice of trial had been again served. *E. Magee v. Mark* 275

5. In an action by A against B, where the Court of Common Pleas had overruled the exceptions taken to the Judge's charge, the Court of Exchequer Chamber afterwards reversed their judgment, allowing some of the exceptions; whereupon A, the plaintiff in error, brought error in the House of Lords. Pending the proceedings in Parliament, B, the defendant in error, presented a petition to quash the writ of error, which application was disallowed. The House of Lords afterwards made an order,

PRESENTMENT, &c. 577

that "the record should be remitted, to the end that such proceedings may be had thereupon as if no such writ of error had been brought into this House." It then directed that "the said plaintiff in error do pay, or cause to be paid, to the defendants in error the costs incurred in respect of the said writ of error, including the costs of the said petition of the defendant in error, &c., the amount of said costs to be certified by the Clerk of the Parliaments." It was subsequently ordered, "that the said defendants in error do recover against the said plaintiff in error £543. 1s. 4d., &c., for his costs, &c., by reason of the delay of the said judgment of reversal, &c., and also of the proceedings aforesaid, to the end that execution should be had thereupon." The record having been remitted to the Exchequer Chamber, and thence to the Common Pleas, the officer of the Court, without further order, permitted the defendant in error to issue execution against A for the amount of these costs. A, having paid the amount, under protest, applied to the Court to set aside the writ of execution, upon the ground that the House of Lords had no jurisdiction to include in their order the costs of the abortive petition of the defendants in error, and that there was no order of this Court awarding execution.—*Held*, that this Court was absolutely bound by the order of the House of Lords.

Held also, that execution was issuable immediately upon the return of the record, with the Lords' order, without further order of this Court. *C. P. M'Mahon v. Leonard* 44

PREMISES NOT SEPARATELY RATED.

See REGISTRY APPEAL, 4.

PRESENTMENT.

See GRAND JURY ACT.

PRESENTMENT SESSIONS.

See ASSAULT.

PRIORITY BY REGISTRATION.

See DEED, 1.

PRIVILEGE.

See BARRISTER.

PRIVILEGE OF WITNESS.

See LIBEL, 1, 2.

WEIGHMASTER.

PRIVILEGED COMMUNICATION, PLEA OF.

See LIBEL, 2.

PROCEDURE ACT.

See BOND.

PLEADING, 2.

USE AND OCCUPATION.

The meaning of the provision of section 43 of the Common Law Procedure Amendment Act 1853, that the time for appearance and defence to a summons and plaint, by a defendant resident within the jurisdiction, where the writ has been regularly filed, shall be twelve clear days from the day of service, exclusive of holidays, is, that the defendant shall have the day of service and twelve days following, exclusive of holidays, for filing his defence. Hence, where a writ was served upon Thursday the 17th of November 1859, and the plaintiff, on the 2nd of December following, marked judgment by default, no defence having been filed in the meantime, and no holidays except the two Sundays having intervened—*Held*, that such judgment had been regularly marked.

Before the time for pleading had expired, the defendant served a notice on the plaintiff, under section 64, for the production of a document, and, two days later, served a notice of motion to the same effect, not moveable, according to the course of the Court, until the time for pleading had expired. Before the notice could be moved on, the plaintiff marked judgment.

Held, that according to the true construction of section 64 of the Procedure Act, and General Rule 57, the service of such notice could not in

QUO WARRANTO.

any event operate as a stay of proceedings, and that the regularity of the marking of the judgment was not affected by the motion for the production being subsequently granted. C. P. *Boyd v. Nethery* 369

PROMISSORY NOTE.

Action on a promissory note, payable to M. C., and by him indorsed to the plaintiff.—Defence, that M. C., being the owner of two statutable mortgages affecting certain lands of which he was in possession, proposed to sell the mortgages to defendant for £200, and falsely and fraudulently represented to defendant that all the rent of the lands had been paid, whereas there were, to the knowledge of M. C., five years' arrears of rent due, for which an ejectment had been threatened; that the defendant, being deceived by such representations, purchased the statutable mortgages, paying therefor £100 cash, and £100 secured by the note relied on, which the defendant averred was void by reason of said fraud; that, after the passing thereof, an ejectment was brought; and, in order to redeem the lands, defendant paid the arrear of rent and costs, which were more than the amount of the note and interest; and that, by reason of the arrear of rent so paid by the defendant, the value of the mortgages was lessened by more than the last mentioned amount. The defence also averred that the plaintiff took the note when overdue, and with full notice of the premises. The plaintiff demurred to this defence.—*Held*, that the defence was no answer to the action.

Semble—That the defendant might bring a cross action for the misrepresentation. Q. B. *Burke v. Eyre* 104

PUBLICAN'S LICENSE.

See MANDAMUS.

QUO WARRANTO.

1. A, being duly qualified, was elected a Councillor for a borough, under the

3 & 4 *Vic.*, c. 108, and made the requisite declaration of his qualification, and of his acceptance of the office; but, before the expiration of three years from the date of his election, A, having, as was alleged by affidavit, given up the premises in respect of which he was qualified, and believing himself to be therefore disqualified, gave notice to the Town-clerk that he had resigned the office of Councillor; and a notice was thereupon posted, by order of the Mayor, announcing the vacancy, and that an election would be held on the third day afterwards, to fill up the office. At the election so held, B was elected Councillor.

The Court, under these circumstances, granted a *quo warranto*, calling upon B to show by what authority he claimed to exercise the office of Councillor. Q. B. *The Queen v. Finnegan* 299

2. Information in the nature of a *quo warranto* will not be granted to try by what title a party exercises the office of Mayor of a borough, where the ground of such application is a defect in the title of those who have elected him Mayor. Q. B. *The Queen v. M'Carthy* 312

RAILWAYS CLAUSES ACTS
(8 & 9 *Vic.*, c. 20, and 14, 15 *Vic.*, c. 70).

1. The plaintiff occupied a cottage and a small piece of land, on a level with and abutting on a public high road, from which a short way or passage over the plaintiff's land afforded access to his cottage. A Railway Company, in the execution of the works of their Railway, lowered the public high road seven feet, leaving the plaintiff's land and cottage on the edge of a precipice of that height, and thereby obliging the plaintiff to make use of a step-ladder in order to obtain access from the public high road to the way or passage leading over his land to his cottage. An action having been brought by the plaintiff against the Railway Company, under the Rail-

ways Clauses Consolidation Act 1845 (8 & 9 *Vic.*, c. 20), ss. 53, 55:—*Held*, by the Exchequer Chamber (affirming the judgment of the Queen's Bench), that the action was not maintainable, the injury complained of by the plaintiff being an injury of a permanent nature to his land, and, therefore, the subject of compensation by the arbitrator, pursuant to the Railways Clauses Consolidation Act 1845, s. 6, and the 14 & 15 *Vic.*, c. 70.—[*Pigot, C. B., dissentiente*].

A plaint contained three counts for special damage, alleged to have accrued to the plaintiff, by reason of a breach of duty on the part of the defendants, and also three counts in trespass *quare claus. freg.* Issues were knit upon all the counts. The trial proceeded mainly, if not entirely, on the counts for special damage. The jury found generally for the plaintiff, with £50 damages. There was some evidence to sustain the counts in trespass. The Court of Exchequer Chamber decided that the action was not maintainable on the counts for special damage; and, although satisfied that the damages were given principally, if not entirely, in respect of those counts, yet, not being able to apportion the damages, awarded a new trial. Q. B. and Ex. Ch. *Moore v. Great Southern and Western Railway Company* 46

2. The plaintiff occupied a dwelling-house abutting on a public high road. A Railway Company, in the execution of the works of their Railway, raised the public high road to the height of ten feet, opposite to the plaintiff's house; and the special damage resulting from the acts of the defendants was, as the plaintiff alleged, that the access to his house was impeded, and the house rendered damp and unwholesome by rain and mud which penetrated into it from an adjoining bridge, whereby the plaintiff lost his health. To an action brought by the plaintiff for these grievances, against the Railway Company, under the Railways Clauses Consolidation Act

1845, ss. 53, 55, the Company pleaded a justification, under their Private Act and the statutes in that case provided.—*Held*, overruling a demurrer to the defence, that the action was not maintainable, the plaintiff's loss of health being the consequence of the injury to his house, and such injury being of a permanent nature, and the subject of compensation by the arbitrator, pursuant to the 14 & 15 *Vic.*, c. 70. *Q. B. Tuohy v. S. and W. Railway Co.* 98

REGISTRY APPEAL.

1. In order to be entitled to register under the proviso at the end of section 14 of 13 and 14 *Vic.*, c. 69, the claimant must have a right to the premises by virtue of his appointment to the benefice.

Quære—Is the office of Wesleyan minister "a benefice," within the meaning of this proviso? *Ex. Ch. Foster v. Mulhall* 532

2. Appellant claimed to vote in respect of occupation of house No. 20 N.-street, in immediate succession from house No. 6 N.-street, for twelve months on and previous to the 20th of July 1859. He had been on the previous registry in respect of No. 6, and came into occupation of No. 20 in May 1859. No. 20 was rated in the rate struck in September 1858, then being in the occupation of P. M., who let part of it to appellant. In the rate struck 20th of August 1859, appellant was rated in respect of No. 20.—*Held*, that the latter rate-book could not be received in evidence, and that appellant was bound to show that on the 20th of July 1859 he occupied premises then separately rated.—Vote disallowed. *Ex. Ch. O'Rourke v. Carlisle* 535
3. In the list of claims No. 11, furnished by the Town-clerk, the name of T. F. appeared as a claimant. The nature of the qualification was stated in that list to be "Rated occupier of houses and tenements rated at £8 and upwards, in immediate succession, for

twelve months on and previous to the 20th of July 1859;" and the place where the property was situated was described as "North Main-street." The claimant proposed to read his original notice of claim, to show that he had therein properly described the *several premises* so held in succession; but the Revising Barrister held that he was bound by the Town-clerk's list of claims, and could not amend it, and rejected the claim.—*Held, per Curiam*, that the claim should have been allowed; *per GREENE, B., HAYES and CHRISTIAN, JJ.*, that the list was defective, but that the defect was such that the Revising Barrister should have amended it under sec. 55; *per HUGHES, B.*, the Town-clerk's list was sufficient; *per HUGHES, B.*, the Barrister was not only entitled, but bound, to amend. *Ex. Ch. Ford v. Corcoran* 539

4. The qualification of the claimant was set out on the claimants' list as follows: "Rated occupier, in succession, of offices at C., valued at £10, to land at C., valued at £10. 5s. 0d." The land held at C. was a portion of certain premises for which one T. N. was rated at £20. 5s. 0d.; but no rate had been struck since the claimant came into possession of the portion. The claimant had served a claim on the clerk of the union to be rated in respect of the portion occupied by him at £10. 5s. 0d.—*Held*, reversing the decision below, that the claimant was not entitled to vote. *Ex. Ch. Brangan v. Shaw* 545
5. The respondents were co-lessees of certain premises, and jointly liable to the rent and taxes of the same. It did not appear that they used the premises for their own purposes. Two separate societies occupied portions of the premises as tenants from year to year, and paid rent for them; one servant was in charge of the entire premises; the rent and taxes, for which the respondents were liable, and the servant's wages, were paid by means of subscriptions paid by

REGISTRY APPEAL.

members of the two societies, who occupied as undertenants.—*Held*, reversing the decision of the Revising Barrister, that the respondents were not entitled to register out of the premises.—*Luckett v. Bright* (1 Lut. 456) distinguished. Ex. Ch. *Corcoran v. Bernard* 547

6. The respondent's name appeared on the previous registry, and on the list No. 7. He was summoned by the objector, who proposed to examine the respondent, to prove that the respondent was not entitled to be on the registry then under revision. The respondent declined to be examined, until some evidence was given to displace his right, and was not examined. The Revising Barrister having allowed his vote:—*Held*, the respondent was bound to give his testimony, and the Revising Barrister's decision was reversed. Ex. Ch. *Peterson v. Balfour* 553

7. In the rate-book four persons appeared in respect of premises of the annual value of £30. Only two of those four persons (the appellants) were named as lessees in the lease of the premises, but all four were liable to contribute to the rent.—*Held*, the two appellants could not maintain their right to register, they being rated with two others, and the value of the premises not being sufficient to allow of four persons voting thereout. Ex. Ch. *Crean v. Metcalf* 554

8. Appellants were partners in trade, and joint owners of a house and offices, rated at £113. They occupied part of the premises for the purposes of their trade, but did not reside in the house. The upper portion of the house was let, at a yearly rent, by lease, to Messrs. N. and F., solicitors, who carried on their business there, but did not reside. There was one servant, paid by the appellants, who resided in the house and took care of the entire premises. The appellants and Messrs. N. and F. had access to their several portions of the premises by the same hall-door, which was

REPLEVIN.

581

locked every night by the servant.—*Held*, the appellants were not entitled to register as occupiers under section 6.

Unless the owner has the general control and superintendence of the house, the person who occupies under him at a rent is not a lodger. Ex. Ch. *Scott v. Metcalf* 557

REGISTRATION, SUFFICIENCY OF.

See DEED 1.

MEDICAL ACT.

REMAINDER.

See MARRIAGE SETTLEMENT.

RENT, ACTION FOR.

See ACTION FOR RENT.

RENTCHARGE, CREATION OF.

See REPLEVIN.

REPEAL OF A FORMER BY A SUBSEQUENT STATUTE.

See CONVICTION.

REPLEVIN.

To an action of replevin, the defendant pleaded, by way of avowry, the grant of a rentcharge to her, the defendant, and justified the taking, as a distress for the arrears; but the plea did not aver a compliance with the requirements of the 9 & 10 Vic., c. 111.—*Held* (FITZGERALD, B., *dissentiente*), that the plea was bad.

By deed, executed upon the marriage of J. T. with M., J. T., in consideration of the marriage, and by virtue of a bargain and sale (no lease for a year being recited), bargained and sold, &c., certain lands to trustees, and the survivor and the heirs of the survivor; *habendum* for 500 years, for the use of J. T. for his life, remainder over; and further, to permit M., in case she survived J. T., to take a jointure of £50; and, in case same should be in arrear, that it should be lawful for the trustees or the said M., the defendant, to dis-

train for the payment thereof.—*Held*, that the deed granted a legal rent-charge to M.

The plea averred that J. T. was, at the time of the execution of the deed, &c., "seised" of the lands in question, and, being so "seised," by indenture, &c., granted the lands, &c.—*Held*, that the averment of the estate of J. T. was sufficient on general demurrer. *E. Goggins v. Trench* 472

RESIGNATION.

See QUO WARRANTO, 1.

RIGHT OF ENTRY.

See EJECTMENT, 1.

ROAD.

See GRAND JURY ACT.

ROMAN CATHOLIC RELIEF ACT.

See WEIGHMASTER.

SCHEDULE.

See DEED, 2.

SECONDARY EVIDENCE.

See ADVERSE POSSESSION.

SECURITY FOR COSTS.

See PENALTIES.

PRACTICE, 1, 4.

SEPARATION DEED.

A separation deed contained the following proviso:—"That neither the said wife nor husband shall not nor will, at any time hereafter, institute or commence, &c., any suit, &c., in any Ecclesiastical or other Court, or apply for any Act of Parliament, with a view of obtaining a divorce, upon any ground, or for any cause whatever, either now existing, or which may afterwards arise or be conceived to exist; provided always that, in case any suit, &c., shall be instituted, &c., by said H. C. (the wife), then and from thenceforth the said yearly sum or sums hereinbefore covenanted to be paid, &c., shall absolutely cease and

STATUTES QUOTED.

determine." The deed also provided that, in the event of the husband taking such proceedings, the wife's annuity should be increased. By the same deed, an annuity was granted to the wife, which was expressed to be "in consideration of the agreement and understanding that she should not, at any time thereafter, molest or disturb the said husband in his person, or in his manner of living, nor at any time or times hereafter require, or by any means whatever, by ecclesiastical censures, or by taking out any citation or process, or commencing or instituting any suit whatever, or otherwise howsoever, endeavour to compel him to cohabit or live with her, or to enforce any restitution of conjugal rights, nor require, nor by any means whatsoever endeavour to compel him to allow her any further or other alimony or maintenance than is allowed by these presents." The wife afterwards brought an action to enforce the arrears of said annuity.—*Held*, that, assuming the proviso in question to be void, on the ground of public policy, as tending to encourage immorality, it did not form any portion of the consideration for the grant of the annuity, and that the action was maintainable. *C. P. Jackson v. Cridland* 376

SET-OFF.

See PROMISSORY NOTE.

SLANDER.

See LIBEL 2.

SPECIAL VERDICT.

See GAME LAWS.

SPIRIT LICENSE.

See MANDAMUS.

STATUTES QUOTED.

9 W. 3, c. 10.

1 & 2 Vic., c. 28.

3 & 4 Vic., cc. 91, 108.

8 & 9 Vic., c. 20.

SUBLETTING.

9 & 10 *Vic.*, co. 109, 111.
12 *Vic.*, c. 16.
14 & 15 *Vic.*, c. 70.
16 & 17 *Vic.*, c. 113, s. 135.
17 & 18 *Vic.*, c. 102.

SUBLETTING.

See REGISTRY APPEAL, 5.

SUBSEQUENT RATE-BOOK.

See REGISTRY APPEAL, 2.

SUBSTITUTION OF SERVICE.

See PRACTICE, 2.

SUITORS' FEE-FUND.

See BOND.

SURPRISE.

See EJECTMENT, 2, 3.

TERM.

See LEASE, 1.

TOWN-CLERK'S LIST OF CLAIMS.

See REGISTRY APPEAL, 3.

TOWN-COUNCILLOR.

See QUO WARRANTO, 1.

TRESPASS.

See MAGISTRATES.

A proposal in writing was made by A and B to D, to take the rights of quarrying whinstones on the hill of H., and to pay a royalty of three pence per ton for a term of three years, and was verbally accepted. A and B, having subsequently quarrelled, the former took C into partnership, and proceeded to work the quarries. A subsequently surrendered his interest to D. A notice to quit having been served on C by B and D, they, before the expiration of the three years, entered the premises, and expelled C.—*Held*, that, assuming that a term for three years had been created by parol, D, by the surrender of one of the co-tenants, became a tenant

USE; &c.

583

in common with B, and they were entitled to expel C, who had not, by reason of the partnership, acquired any interest in the land.

Held also, that, taking the agreement not to have operated as a demise of the land, but merely as a license to quarry, it was revocable at the pleasure of D. C. P. *Smith v. Earl of Howth* 125

TRESPASS, Q. C. F.

To an action of trespass, *q. c. f.*, for breaking down certain walls of the plaintiff, the defendant pleaded that he was possessed of certain walls abutting upon the walls of the plaintiff; that the walls of the latter were ancient and dilapidated, and not properly bound together; that the defendant did pull down his own walls (as he lawfully might), and in so doing did harmlessly enter the plaintiff's close, and slightly commit the alleged grievances, but that the committing of the said grievances took place of necessity, in the lawful discharge of the defendant's right, and with all due and reasonable care, and by reason of the condition of the defendant's walls, and by his negligence and default.—*Held*, an insufficient defence to the action. C. P. *Hargreave v. Meade* 117

TRESPASS, AND TRESPASS ON THE CASE.

See PLEADING, 2.

TRUSTEES.

See ACTION FOR RENT.
GRAND JURY ACT.

TURBARY.

See LEASE 1.

USE AND OCCUPATION.

To the plaintiff in an action for use and occupation, to recover "the sum of £70, on account of money payable by the defendant to the plaintiff, for the defendant's use, by the plaintiff's per-

584 USER OF PREMISES.

mission, of part of the lands of P., situate," &c., the defendant demurred, upon the ground that it did not appear therefrom that the lands were the lands of the plaintiff.—*Held* (overruling the demurrer), that a good cause of action was disclosed by the plaint, by reason of the averment that the defendant occupied the lands by the plaintiff's permission.

Although forms of action are abolished by the Common Law Procedure Act, the plaint must nevertheless disclose a cause of action good in substance.

The forms in the Common Law Procedure Act 1858, sch. B, are not obligatory. Q. B. *Leslie v. Johnstone* 83

USER OF PREMISES.

See REGISTRY APPEAL, 5.

VERDICT.

See GAME LAWS.

VOLUNTARY CONVEYANCE.

See MARRIAGE SETTLEMENT.

WAGER.

See CONTRACT.

WARRANT, SUFFICIENCY OF.

See MAGISTRATES.

WEIGHMASTER.

In an action for the disturbance of the plaintiff in the office of weighmaster of the town of C., under the 4 *Anne*, c. 14 (*Ir.*), the defendant pleaded that the plaintiff had not taken the oath required by the Act, nor had taken the oath nor subscribed the declaration required by the Roman Catholic Relief Act; and he also obtained from the Court an order under the Common Law Procedure

WRITTEN AGREEMENT.

Amendment Act 1856, that the plaintiff should answer certain interrogatories. The interrogatories exhibited by the defendant were, as to whether the plaintiff had taken the oaths and subscribed the declaration in question? and also, whether he was a member of the Roman Catholic religion? The plaintiff filed an affidavit, submitting that he was not bound to answer the interrogatories, upon the ground that they were exhibited with a view to obtain a discovery as to how he intended to make out his title to the office. Upon a motion to attach the plaintiff for refusing to answer, it was further insisted, on his behalf, that the answers to the interrogatories might tend to expose him to criminal proceedings, for having acted in the office without having taken the qualifying oaths.—*Held*, that, irrespective of the question whether the discovery sought for would, under any circumstances, have been obtainable, it was a valid reason for declining to answer, that the plaintiff apprehended that his answers might tend to criminate him.

Held also, that this ground of objection might be insisted on at the hearing of the motion, without having been specifically stated in the affidavit.

Held also, that the plaintiff was also entitled to decline answering the interrogatories as to whether he was a Roman Catholic, as this question was a link in the chain of the other inquiry. C. P. *M'Mahon v. Ellis* 120

WESLEYAN MINISTER.

See REGISTRY APPEAL, 1.

WORDS SUPPLIED BY IMPLICATION.

See BOND.

WRITTEN AGREEMENT.

See EJECTMENT, 1.

INDEX TO APPENDIX.

ADJOURNED SESSIONS.

See CIVIL-BILL ACT.

ASSAULT AND FALSE IMPRISONMENT.

See PLEADING.

BILL OF EXCHANGE.

Action on a bill of exchange, by indorsee against acceptor.—Defence, traversing the acceptance. Leave given to the plaintiff to reply, first, that the acceptance was the defendant's acceptance; and, secondly, that the defendant represented that the bill was genuine, on the faith of which representation the plaintiff cashed the bill. Q. B. *Kennedy v. Verdon* x

BILLS OF SALES ACT.

The affidavit of registration of a bill of sale under the 17 & 18 Vic., c. 55, s. 1, omitted to state the description and occupation of the grantor, and of each of the attesting witnesses. An application to have the bill of sale and the affidavit of registration taken off the file, for the purpose of having this omission rectified, refused; the proper course being to file a new bill of sale and affidavit of registration, with an indorsement thereon, referring to the first bill of sale, and to the effect that each of the bills of sale is made for the same purpose and relate to the same transaction, but that, by reason of an irregularity in the affidavit of registration of the first bill of sale, it had become necessary to file the second bill of sale and affidavit of registration. Q. B. *In re O'Brien* xxxiii

BOND.

Execution cannot be issued on a judgment entered on a warrant of attorney collateral with a money bond conditioned for payment by instalments, until breaches have been duly suggested on the bond.

A, by a letter of the 4th of March, proposed to sell his business and stock to B, for a sum to be paid by yearly payments of £60 per annum, in monthly instalments of £5 each; the whole amount to be secured, with interest, by B's bond, and by an assurance on B's life, to be effected by B, who was to pay the premiums thereon. This proposal was accepted by B, by a letter of the same month, and B was accordingly put into possession of the business and stock, and executed a money bond to A, conditioned for the payment of £300 and interest; B also executed a warrant of attorney, on which judgment was entered, collateral with the bond, but no policy of assurance was effected, as agreed. B paid one instalment in the following June, which was duly acknowledged by A, by a letter of the 4th of June; but default having been made in payment of subsequent instalments, A issued execution on the judgment, without suggesting breaches.—*Held*, that there was an agreement that the purchase-money should be paid by instalments, the bond being referred to in the letters, and consequently that breaches ought to have been suggested before execution was issued on the judgment. The execution, therefore, was set aside. Q. B. *Hull v. Blackwell* xxxviii

BREACHES, SUGGESTION OF.

See BOND.

CAUSE AGAINST CONDITIONAL ORDER.

See PRACTICE, 5.

CAUSE OF ACTION.

See PRACTICE, 9.

CHANGE OF VENUE.

An application to change the venue, after plea pleaded, and before issue joined, is not premature. *Q. B. Kennedy v. Lynch* xliv

CIVIL-BILL ACT.

By the Civil-bill Act (14 & 15 Vic., c. 57, s. 24), five General Sessions of the Peace are to be held yearly in each Riding of the County of Cork. By proclamation, pursuant to that and the 31st and 32nd sections, it was ordered that four General Sessions of the Peace, and no more, should be held in each Riding, and (amongst others), that, for the Division of Bandon, an October General Quarter Sessions should be held at Bandon, adjourning from Bandon to Macroom for Civil business only.

Ejectments, on notice to quit, for premises in the Division of Bandon, were made returnable to the Macroom Sessions, and served fifteen clear days before the 29th of October, the day on which the Macroom Sessions commenced.—*Held*, that the ejectments were right, and were duly served; and that it was not necessary that they should have been made returnable to and served in time for the Bandon Sessions. Cir. case. *Murphy v. Creedan* xxix

CONDITIONAL ORDER.

See PRACTICE, 5.

COSTS.

See PRACTICE, 1, 6, 8.

SETTING ASIDE PROCEEDINGS.

The plaintiff brought an action against

DEFENCE, EQUITABLE.

the defendants, for injuries done to his land, in the execution of their works. The defendants demurred to certain counts of the summons and plaint, which demurrer was allowed by the Court of Queen's Bench, with costs. The plaintiff having appealed, the defendants applied to the Court of Exchequer Chamber to stay all further proceedings by the plaintiff, until security for the costs was given. The motion was refused, and the defendants ordered to pay the costs of it. The defendants took the plaintiff in execution under a *ca. sa.*, for the costs of the demurrer.—*Held*, that the defendants were entitled to set off the costs of the demurrer against the costs obtained by the plaintiff in the Exchequer Chamber, notwithstanding his having been taken in execution; the 35 G. 3, c. 35, s. 31 (*Ir.*), preventing such taking in execution of the plaintiff from operating as a satisfaction of the costs. *Q. B. Moore v. Great Southern and Western Railway Company* xxxi

CROWN SIDE.

See PRACTICE, 5.

DEFENCE.

See PLEADING.

PRACTICE 3.

SETTING ASIDE DEFENCES.

TRESPASS, Q. C. F.

To a count against an agent, to whom goods were consigned for sale on commission, for not accounting for the goods sold, and re-delivering the unsold residue of the goods, the defendant pleaded, "that he did not undertake and promise, in manner and form as alleged."—*Held*, that the defence was embarrassing, as amounting to the general issue. *Q. B. Fitzgibbon v. Nagle* xxxv

DEFENCE, EQUITABLE.

See SETTING ASIDE DEFENCE.

The defendant, in September 1857, became tenant from year to year, of a

DEMURRER.

house, to the plaintiff, at the rent of £2 yearly, in advance, and upon the terms that he should be paid or allowed by the plaintiff for all necessary repairs which he should do to the house whilst such tenant. The defendant paid one year's rent in advance, and expended £3. 10s. in repairs, but was served with a notice to quit in September 1859, by the plaintiff, who subsequently brought an ejectment against the defendant, who allowed judgment to go by default. The plaintiff having brought an action for mesne rates, the defendant pleaded these facts, and giving the plaintiff credit for £2 (the year's rent up to September 1859), out of the £3. 10s., offered to set off the residue (£1. 10s.) against the plaintiff's damages, which were averred in the defence to be £1. 10s., and no more.

Motion to set aside this equitable defence refused with costs. Q. B. *Tully v. Roach* xxi

DEMURRER.

See SET-OFF.

EJECTMENT.

See CIVIL-BILL ACT.

A defence of payment, to an action of ejectment for non-payment of rent, set aside as false; it appearing, by the uncontradicted affidavit of the plaintiffs, that the rent had not been paid and was still due. Q. B. *Stokes v. Hartnett* xx

ENTERING SATISFACTION ON WARRANT OF ATTORNEY.

Memorandum of satisfaction ordered to be entered on a warrant of attorney, under the 3 & 4 Vic., c. 105, s. 18; the defendant having sworn to the payment of the sum due upon the bond, and the bond, with an acknowledgment on the back of it, signed by the plaintiff (which was verified), admitting the receipt of the sum for which it was given, having been pro-

JURISDICTION, &c. 587.

duced in Court. Q. B. *Boyd v. M'Cleans* xxxvii

EMBARRASSING DEFENCE.

See DEFENCE.

PLEADING.

PRACTICE, 3.

SETTING ASIDE DEFENCES.

TRESPASS Q. C. F.

ESTOPPEL.

See BILL OF EXCHANGE.

FALSE PLEA.

See EJECTMENT.

FORGED ACCEPTANCE.

See BILL OF EXCHANGE.

FORM OF NOTICE TO SET ASIDE PLEADINGS.

See PRACTICE, 2.

GENERAL ISSUE.

See DEFENCE.

GENERAL ORDER.

See PLEADING.

HALF COSTS.

See PRACTICE, 8.

HEIR-AT-LAW OF TRUSTEE.

See SETTING ASIDE PROCEEDINGS.

INFERENCE OF LAW.

See DEFENCE.

INSTALMENTS.

See BOND.

IRREGULARITY.

See BILL OF SALE.

JUDGMENT SET ASIDE.

See PRACTICE, 1.

JURISDICTION OF SHERIFF IN DUBLIN CASES.

See PRACTICE, 7.

LUNATIC, NEXT FRIEND OF.

See PROCEDURE ACT.

MESNE RATES.

See DEFENCE, EQUITABLE.

MINOR, NEXT FRIEND OF.

See PROCEDURE ACT.

NEXT FRIEND.

See PROCEDURE ACT.

NOTICE TO SET ASIDE PLEADINGS, FORM OF.

See PRACTICE. 2.

ORDER OF ATTACHMENT UNDER s. 132 PROCEDURE ACT 1853.

See PRACTICE, 4.

PLEADING.

See BILL OF EXCHANGE.

DEFENCE.

DEFENCE, EQUITABLE.

PRACTICE, 3.

SETTING ASIDE DEFENCES.

SET-OFF.

TRESPASS, Q. C. F.

To a count "that the defendant maliciously, and without any reasonable and probable cause, gave the plaintiff in charge to a policeman, and caused him to be imprisoned," &c., the defendant pleaded, "that he did not do or commit all or any of the said acts maliciously, and without reasonable and probable cause, as alleged."—*Held*, following *Brennan v. Williams* (9 Ir. Com. Law Rep., App., xxxv), that this defence was embarrassing, as putting in issue both the committing of the acts and also the want of reasonable and probable cause.

The police charge-sheet, summons and police-office report of charges, are records the production of which, on a trial for assault and false imprisonment, may be obtained by a notice under the 73rd General Order

of January 1854. Q. B. *Smith v. Whelan* xvii

PLAINTIFF'S NAME USED WITHOUT HIS CONSENT.

See SETTING ASIDE PROCEEDINGS.

PRACTICE.

1. A judgment marked by the plaintiff, pending a motion for security for costs, will be set aside, as of course, if the pending motion be granted. A defendant does not disentitle himself to security for costs by obtaining an extension of the time for pleading. E. *Stewart v. Ballance* i
2. A notice of motion to set aside a pleading as embarrassing, under the 83rd section of the Common Law Procedure Act 1853, should state the particular objections upon which the party intends to rely. E. *Martin v. Lane* iii
3. A pleading framed in such a manner as to be susceptible of one construction upon demurrer, and another at Nisi Prius, will be set aside as embarrassing. E. *Clarke v. Scully* iv
4. When a judgment creditor obtains a charging order, under section 132 of the Common Law Procedure Act 1853, attaching the dividends of stock in the books of the Bank of Ireland, which order is duly served upon the Bank, the Bank will be held responsible, if it pay such dividends to another judgment creditor, who, subsequently to the date of such charging order, has obtained, in a different Court, not only another charging order attaching, but also an absolute order for the payment of such dividends. Q. B. *Salaman v. Donovan* xiii
5. On the Crown side, if notice to show cause against a conditional order is served within the period named in such order, the party showing cause is entitled to move; but if such notice is not served within that period, then, whichever party, whether prosecutor or defendant, first serves notice of

motion is entitled to move. Q. B. *Phibbs v. Kearns* xix

6. Where the plaintiff, in an action of contract, in which he had recovered a sum under £20, had an office within the civil-bill jurisdiction where the defendant resided, but the plaintiff's dwelling-house, where he resided with his family, was in another civil-bill jurisdiction:—*Held*, that, under the Common Law Procedure Amendment Act 1856, s. 97, the plaintiff was not entitled to costs. C. P. *D'Arcy v. Hastings* xxiv

7. *Semble*.—The jurisdiction of the Sheriff to hold a writ of inquiry for damages, in Dublin cases, is not taken away by the Common Law Procedure Acts 1853 and 1856.

But where, in such cases, a plaintiff proceeds before the Sheriff, the Court, on the application of the defendant, may order the inquiry to be sped before the Master. E. *Segrave v. Duffy* xxvii

8. An action against a common carrier, founded upon his Common Law duty, is not an action "for a wrong or injury disconnected with contract," within the provisions of the 243rd section of the Common Law Procedure Act 1853; and therefore the plaintiff is not entitled to full costs, in case he recovers less than £20; but the defendant, in such case, having obtained a special jury, and no certificate having been given by the Judge, is liable for the full costs of the special jury. C. P. *Kerr v. Midland Great Western Railway Company* xlv

9. In an action against an English Company, for the loss of luggage, the summons and plaint averred that the defendants received on board their vessel the plaintiff, as a passenger from New York to Galway, with a trunk, &c., to be carried in said vessel from New York to Galway, and safely to be delivered for the plaintiff.

Breach—that the defendants, dis-

regarding their duty, &c., did not safely or securely carry same to Galway, but, on the contrary, so carelessly and negligently behaved themselves that, through the carelessness and negligence of the defendants, the box and its contents were wholly lost.—*Held*, that the plaint stated a cause of action within the jurisdiction, which would justify an order for substitution of service. E. *Powell v. Atlantic Steam Navigation Company* xlvii

PROCEDURE ACT.

See BOND.

DEFENCE.

PRACTICE, 6, 8.

SETTING ASIDE DEFENCES AS EMBARRASSING.

In order to obtain a rule to appoint a person as next friend for a lunatic or a minor, satisfactory information as to the fitness of such person must be furnished to the Clerk of the Rules, by the attorney applying for the rule; in the case of lunatics by the affidavit of such attorney, and in the case of minors by affidavit, or otherwise. Q. B. *Ronayne v. Perrin* xxxvi

PRODUCTION OF PUBLIC RECORDS.

See PLEADING.

REGISTRATION OF BILL OF SALE.

See BILL OF SALE.

REPLICATIONS.

See BILL OF EXCHANGE.

REPRESENTATION OF DEFENDANT.

See BILL OF EXCHANGE.

RIGHT TO BEGIN.

See PRACTICE, '5.

SATISFACTION ON WARRANT OF ATTORNEY.

See ENTERING SATISFACTION.

590 SECURITY FOR COSTS.

SECURITY FOR COSTS.

See PRACTICE, 1.

SERVICE OF PROCESS.

See CIVIL-BILL ACT.

SET-OFF.

See COSTS.

DEFENCE, EQUITABLE.

Trover, and conversion of defendant's goods by plaintiff, cannot be pleaded as a defence by way of set-off to an action for a liquidated sum. *Q. B. Cuffe v. Lawson* xlii

SETTING ASIDE DEFENCES AS EMBARRASSING.

To an action for use and occupation, the defendant pleaded, secondly, that before the 25th of March 1853, the defendant, being then tenant to the plaintiff's testator, of the said premises, under a parol demise, agreed to buy, and said testator agreed to sell, said testator's interest in the premises for "£3250, to be paid on the perfecting the deed of sale; and the rent of the premises to be settled up to the 25th of March 1853." Averment—that on the 1st of May 1854, in pursuance of the agreement, the £3250 was paid, the rent settled up to said 25th of March 1853, and the deed of sale perfected, and that plaintiff's testator accepted such payment and settlement, and executed said deed. Averment—that it was under said contract, and not as tenant, that defendant used and occupied.

The defendant also pleaded, thirdly, by way of equitable defence, that, during the period in respect of which the plaintiff made his claim, he held and dealt with the premises, to the knowledge of plaintiff's testator, not as tenant, but as equitable owner under the contract mentioned in the preceding defence; and that said contract was afterwards carried into effect, and all claims in respect of said premises determined by the payment of the purchase-money and the settlement

SUBSTITUTION OF SERVICE.

of rent up to a certain date by the defendant, and by the conveyance of said testator's estate and interest to the defendant. The Court refused, with costs, an application to set aside the second defence as embarrassing, and to set aside the third defence as not being within the provisions of the Common Law Procedure Act 1856. *Q. B. Denniston v. Digan* vii

SETTING ASIDE FALSE DEFENCE.

See EJECTMENT.

SETTING ASIDE PROCEEDINGS.

An action having been brought in the name of the heir-at-law of the surviving trustee of a will, to recover rent under a lease made by such trustee, reserving the rent for himself and his heirs, notwithstanding that the heir-at-law had refused to interfere in the trusts, and had expressly cautioned the attorney against using his name; the Court, although an indemnity against the costs of the action had been offered, set aside the summons and plaint, and ordered the costs, both of the heir-at-law and the defendant, to be paid by the attorney who issued the plaint. *Q. B. Bowke v. Murray* xi

SHERIFF, INQUIRY BEFORE.

See PRACTICE, 7.

SPECIAL JURY.

See PRACTICE, 8.

STATUTES QUOTED.

35 *G. 3*, c. 30, s. 31.
3 & 4 *Vic.*, c. 105, s. 18.
17 & 18 *Vic.*, c. 55.

SUBSEQUENT CHARGING ORDER, AND ABSOLUTE ORDER FOR PAYMENT.

See PRACTICE, 4.

SUBSTITUTION OF SERVICE.

See PRACTICE, 9.

SUGGESTION OF BREACHES.

SUGGESTION OF BREACHES.

See **BOND.**

**TAKING PARTY IN EXECUTION
FOR COSTS.**

See **COSTS.**

**TRESPASS QUARE CLAUSUM
FREGIT.**

A defence to an action of trespass *quare clausum fregit*, that the house in the plaint mentioned is not the *property* of the plaintiff, as alleged, is embarras-

WRITS, &c. 591

ing, and will be set aside. Q. B.
Williams v. Williams xxxvi

TROVER.

See **SET-OFF.**

VENUE.

See **CHANGE OF VENUE.**

WARRANT OF ATTORNEY.

See **ENTERING SATISFACTION.**

WRITS OF INQUIRY.

See **PRACTICE, 7.**

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